



CITY OF CHARLESTON
PO BOX 2749
CHARLESTON, WEST VIRGINIA 25330

July 8, 2016

Docket 16-274

CSR-8925

Accepted / Filed

SEP 7-2016

Federal Communications Commission
Cable Services Bureau
445 12th Street S. W., Room 3-C 830
Washington, D. C. 20554

Federal Communications Commission
Office of the Secretary

Re: Request for Definitive Ruling Regarding Pass-thru by Suddenlink
Communications of City of Charleston, WV Municipal Business and Occupation
Tax to Subscribers

Dear Ladies and Gentlemen:

Suddenlink Communications (Suddenlink) is the cable TV, Internet, and phone service operator that provides its services to subscribers through a nonexclusive cable operator franchise agreement with the City of Charleston, WV. Charleston imposes a business privilege Municipal Business and Occupation Tax (B&O tax) on the gross receipts of most businesses, including Suddenlink. Suddenlink and its predecessors have for years itemized and passed-thru this B&O tax on subscriber bills, without seeking authority to do so. It has been my view since 2010 that Suddenlink is not allowed and has no authority to itemize and pass-thru to subscribers the B&O tax it pays.

As you know, Section 622(c) of the Communications Act provides that cable operators may identify as line items on each subscriber's bill the amount of any tax imposed by any government authority on the transaction between the operator and the subscriber. In a letter opinion released on November 19, 1999 regarding *Intermedia Partners of Kentucky, L.P.*, 14 F.C.C.R. 20099, the Deputy of the Chief of the FCC's Cable Service Bureau stated:

...some taxes may be entitled to external cost treatment where they are shown to be, in essence and effect, taxes on transactions between the cable operator and subscribers. Whether or not they are entitled to this treatment is dependent on the manner of the assessment. 14 F.C.C.R. 20099 at 20104.

For your ready reference and as an example, enclosed is a copy of my July 2016 bill. I have marked the B&O taxes in question. (Exhibit 1)

No. of Copies rec'd 0
List ABCDE

It is clear that Charleston's B&O tax is a gross receipts tax on the receipts of most businesses, including Suddenlink. There are 14 classifications of businesses with various tax rates. (See Exhibit 2 for a blank Business And Occupation Tax Return. Suddenlink is a service business, reporting under Classification 12.) The Charleston B&O tax code provides, in pertinent part, as follows:

Sec. 110-31. – Definitions. For the purposes of this article, the following words and phrases shall have the meanings respectively ascribed to them in this section:

Business means all activities engaged in or caused to be engaged in with the object of gain or economic benefit, either direct or indirect.

Gross income means...the gross receipts of the taxpayer derived from trade, business, commerce or sales...or service...

Service business or calling means all activities engaged in by a person for other persons for a consideration, which involve the rendering of a service...

Taxpayer means any person liable for any tax hereunder.

Sec. 110-51. – Imposition of privilege tax.

(a) There are hereby levied and imposed and shall be collected annual privilege taxes, against the persons, on account of the business and other activities...

Sec. 110-58. – Service business or calling not otherwise specifically taxed.

(a) Upon every person engaging or continuing within the city in any service business not otherwise specifically taxed under this article, there is hereby levied, and shall be collected, a tax equal to one percent of the gross income of any such business.

A complete copy of Charleston's Code is enclosed for your ready reference.
(Exhibit 3)

It is vitally important to recognize that the B&O tax is levied on all gross receipts that Suddenlink receives, including advertising, cable shopping networks, etc. Moreover, Suddenlink has in the past (and may still do, but has not provided that requested analysis) used a rate of 1.15%, rather than the legal rate of 1%. Suddenlink argues that this increased rate covers a period when they were not passing thru the B&O tax and to cover non-subscriber revenue (advertising, cable shopping networks, etc.), not directly

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attributable to each subscriber. Certainly a rate of 1.15% to cover a period when Suddenlink was not passing thru the B&O tax cannot be justified, because it is abundantly clear that the subscribers between periods would not be the same. It should also hold true that advertising and cable shopping network revenues are not identifiable as to each particular subscriber.

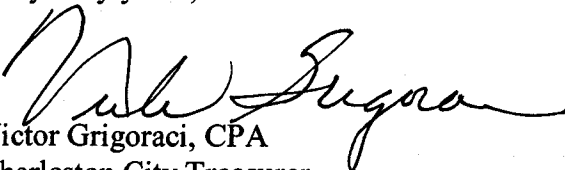
I have also enclosed Charleston's nonexclusive cable operator franchise agreement, which does not address the pass-thru of the City's B&O tax. The franchisee is identified as Cebridge Acquisition, LLC doing business as Suddenlink Communications, all of which have been acquired by Altice NV this year, and still doing business as Suddenlink. (Exhibit 4)

It is clear from the foregoing that Charleston's B&O tax is a privilege tax on all business activities of Suddenlink, which is not levied on the transaction between Suddenlink and the subscriber. Rather the tax is asserted on all the business of Suddenlink and Suddenlink is fully liable for the B&O tax. Moreover, Suddenlink is a service business engaged in for consideration. Subscribers are only purchasers of specific services from Suddenlink. Subscribers are not in anyway conducting business subject to the B&O tax. In addition, Suddenlink uses an unauthorized rate of 1.15% instead of 1%. Finally, the B&O tax is a franchise granted to Suddenlink and, therefore, is a cost of doing business, recoverable in its rate structure, but not directly billable to its subscribers.

Therefore, a definitive ruling is requested holding that Suddenlink is not permitted to identify as a line item on each subscriber's bill the Charleston Municipal Business and Occupation Tax, since the transaction is not between Suddenlink and the subscriber.

Please contact me by email (grigoraci@suddenlink.net) or phone (304-342-5491) if you need any additional information and/or clarification.

Very truly yours,


Victor Grigoraci, CPA
Charleston City Treasurer

cc: Mr. Tom Capito, Assistant City Treasurer
Phone: 304-348-8029
Letter Only:
Mr. Jack Harrison, Chairman, Council Committee on Cable Television
Paul Ellis, Esq., City Attorney



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- ☒ AUTOMATIC, SECURE AND EFFORTLESS.
- ☒ BEST OF ALL, IT'S FREE.

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Service Period	Due Date	Total Due
07/01 - 07/31	07/21/2016	\$145.51

Access Code - 5491
Account Number:
001-2020-052844901

Service Address:
1971 PARKWOOD RD
CHARLESTON WV 25314-2241

PREVIOUS STATEMENT BALANCE	\$144.37
TOTAL PAYMENTS	-144.37
MONTHLY CHARGES	132.21
TAXES AND FEES	13.30
TOTAL BALANCE DUE	\$145.51

Do Not Pay This Bill. This Amount Will Be Drafted.

By bundling, you saved \$57.81 this month!

Includes promotional savings and package discounts.



Become a VIPperks® member

Start enjoying priority service, FREE TV caller ID, periodic FREE movies and much more!

Find out how by visiting suddenlink.com/vip



Please detach and enclose this coupon with your payment



PO BOX 1220
SCOTT DEPOT, WV 25560

Account Number	Payment Due Date	Total Amount Due	Amount Paid
001-2020-052844901	07/21/2016	\$145.51	Auto Pay

Please allow up to 3 days to process your payment once it is received. Payment of this bill confirms your acceptance of the Residential Services Agreement, viewable at suddenlink.com

6040 0400 NO RP 01 06242016 YYNNNNNN 01 013684 0043

VICTOR GRIGORACI
1971 PARKWOOD RD
CHARLESTON WV 25314-2241

02020001400052844901660014551

SUDDENLINK
PO BOX 742535
CINCINNATI, OH 45274-2535





CONTACT US: 1-800-972-5757 | suddenlink.com

Account Number: 001-2020-052844901

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Charge detail for service period Jul 01 - Jul 31

PREVIOUS ACTIVITY

06/21/16	Previous Statement Balance	144.37
	Payment - Thank You	-144.37

MONTHLY CHARGES

132.21

	Double Play	Qty	99.50
	Includes: SL200 With HD/DVR Receiver, Special Package Discount, Digital Service, Internet Access, Broadband Internet 50Mbps		
	Movie Package	1	9.00
	Paper Bill Convenience Fee	1	1.00
	Standard Definition Receiver	1	7.00
	SL DigitalLink	10	0.00
	Broadcast Station Surcharge	1	10.56
	Sports Programming Surcharge	1	5.15

TAXES AND FEES

13.30

Video

Franchise Fee	4.92
State Sales Tax	5.93
FCC Fee	0.08
Public Service Commission	0.01
Local Business & Occupation Tax	1.03 ✓
Municipal Sales Tax	0.93

Internet

Local Business & Occupation Tax	0.40 ✓
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TOTAL DUE

145.51

✓ 1.03
40
1.43

Share the love! Tell all your family and friends how much you love Suddenlink and we'll reward you BOTH with \$25 in service credit for each service they sign up for. Go to suddenlink.com/referral for eligibility and program rules and to refer those friends. It's easy.

Please note that there has been a change to some taxes and fees, so your total balance may be different from your previous month's bill.

Just a reminder that you have valuable equipment in your home! All equipment (digital receivers and adapters, internet modems not purchased personally by customers, phone MTA devices and all associated cords and sensors) in use by our customers remain the property of Suddenlink Communications. If you should make changes in your cable service so that you no longer require this equipment, or disconnect service for any reason, you should return the equipment to Suddenlink to avoid equipment fees, which can be substantial. Some restrictions apply and all equipment affected is not listed here.

Worth Every Penny

You shouldn't have to worry about pinching pennies or minding your minutes. Get unlimited local and long-distance calling for one low rate, plus all the phone features you've come to know and love. Plus, you can keep your current phone and phone number as well. Switching and saving with Suddenlink couldn't be easier. Call, stop by or visit us online at Suddenlink.com/telephone for more details.

Watch TV on your schedule!

Turn to Channel 1 to enjoy free Video On Demand. Watch tons of free shows from the most popular channels, get access to the hottest new movie releases and events, and you can even start and stop the program whenever you want. Start getting the most out of your connection!

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suddenlink makes moving easy.

We're here to make moving your services as easy as possible. Call Suddenlink today and let us help.

EASY
MOVE

1-855-761-7118 | suddenlink.com/easymove

VIDEO CLOSED CAPTION - Please call 844-271-8300 to report a Video Closed Caption issue. You may also fax your issue to 866-721-7595, email it to closedcaption@suddenlink.com, or send it to Customer Experience Manager, 520 Maryville Center Drive, Suite 300, St. Louis, MO 63141.

If your check is returned for insufficient funds, you expressly authorize your account to be electronically debited or bank drafted for the amount of the check plus an insufficient funds fee of \$25.00. The use of a check for payment is your acknowledgement and acceptance of this policy and its terms and conditions.

Payments not received by the due date on this statement may be treated as delinquent and assessed a late fee of up to \$5.00 and/or disconnected. If disconnected, additional fees and an activation fee may be required to reconnect.



BUSINESS AND OCCUPATION TAX RETURN CITY OF CHARLESTON

P.O. Box 7786

CHARLESTON, WV 25356

Phone: (304)348-8024 Fax: (304)347-1810

Pay online at: www.cityofcharleston.org



THIS SECTION MUST BE COMPLETED

ACCOUNT #: _____ TAX QUARTER: _____

BUSINESS NAME: _____

ADDRESS: _____

PHONE#: _____

SEE REVERSE
FOR INSTRUCTIONS



COMPUTATION OF QUARTERLY TAX

CLASS CODE	BUSINESS CLASSIFICATION	GROSS AMOUNT	RATE MULTIPLIER	TAX DUE
1	Value of Production of Natural Resources (1%)		0.01	
3	Retailers (1/2 of one percent)		0.005	
4	Wholesalers (15/100 of one percent)		0.0015	
5	Electric Power Companies (4%) <small>(sales & demand charges domestic purposes & commercial lighting)</small>		0.04	
6	Electric Power Companies (3%) <small>(all other sales & demand charges)</small>		0.03	
7	Natural Gas Companies (3%)		0.03	
8	Water Companies (4%)		0.04	
9	All Other Public Utilities (2%)		0.02	
10	Contracting* (2%) <small>(totals from worksheet on back)</small>		0.02	
11	Amusement (1/2 of one percent)		0.005	
12	Service & All Other Business (1%)		0.01	
13	Rents & Royalties (1%)		0.01	
14	Banking & Other Financial Institutions (1%)		0.01	
TOTAL TAX DUE				

If you are reporting contracting income, you must complete worksheet A on back of form.

☐ PLEASE CHECK BOX IF ADDRESS
HAS CHANGED.

UNDER PENALTIES OF PERJURY, I DECLARE
THAT I HAVE EXAMINED THIS RETURN AND TO
THE BEST OF MY KNOWLEDGE AND BELIEF, IT
IS TRUE, CORRECT AND COMPLETE.

A SERVICE FEE WILL BE CHARGED
FOR ALL RETURNED CHECKS.

THIS RETURN WITH PAYMENT TO COVER TAX DUE MUST BE
RECEIVED WITHIN ONE MONTH FROM END OF PERIOD COVERED.

TYPE OR PRINT NAME AND TITLE OF PREPARER

X

PREPARER'S SIGNATURE AND DATE

SIGNATURE REQUIRED

OFFICE USE ONLY

INSTRUCTIONS

1. Determine your Business Classification(s) and corresponding rate(s) from the tax table.
2. Determine your Charleston B&O taxable gross income for each of the classifications and enter it in the appropriate box. (Contracting class instructions are listed below.)
3. Determine your taxes due by multiplying the rate by the taxable income.
(example: \$10,000 in gross taxable income times a service rate of 1.00% or .01 equals a B&O tax due of \$100). **Failure to complete this form in its entirety and/or enclose your remittance will result in your return being sent back to you.**
4. **Sign the return. THIS RETURN IS INVALID UNLESS IT IS SIGNED.**
5. If your name and/or address printed on the form is incorrect, please mark through the incorrect information and write the correct information in the open space.
6. **If your business or rental property has been closed or sold, please send a written statement detailing the status of the business, the date of the change, and requesting the account be closed or put on our inactive list.**
7. If your return is received after the due date, you will be sent a letter for penalties and interest due.
8. Please make checks payable to: City of Charleston
9. Mail payments and/or correspondence to: City Collectors Office, P.O. Box 7786, Charleston, WV 25356
10. If you have any questions, please call us at (304) 348-8024 or via email at cityofcharleston.org.

Our office is open daily, Monday through Friday from 8:00 a.m. to 5:00 p.m., except holidays.

TO BE COMPLETED BY CONTRACTORS ONLY

PROJECT NAME	GROSS TAX AMOUNT	TAX RATE	TAX DUE
		2%	
		2%	
		2%	
		2%	
		2%	
		2%	
		2%	
		2%	
		2%	
TOTALS			

CONTRACTING INSTRUCTIONS

1. Please complete one line for each project that you received payment (if additional lines are needed please attach an additional letter).
2. List the name of the project, the gross amount received and calculate the tax amount due.
3. Transfer the total tax amount due to the front of the return in the contracting (class code 10) tax due field.

Privacy Statement Act

Disclosure of a Social Security Number (SSN) to the City of Charleston is voluntary. If you do not wish to disclose your SSN, you may provide an alternative identification number. The City of Charleston solicits this information pursuant to West Virginia Code § 8-13-13 and the Charleston City Code. The City of Charleston will not disclose your SSN or any other information you provide to any other entity or party. The City of Charleston requests this information to facilitate the verification of withholding and payment of service fees.

ARTICLE II. - BUSINESS AND OCCUPATION TAX⁽²⁾

Footnotes:

-- (2) --

Editor's note—Bill No. 6799, §§ 6-107—6-144, 6-144.1, adopted Jan. 22, 2002, repealed ch. 110, art. II, divs. 1—5, §§ 110-31—110-34, 110-51—110-63, 110-111—110-115, and 110-141—110-149, in its entirety and enacted new provisions to read as herein set out. Prior to amendment, art. II pertained to similar subject matter and derived from Code 1975, §§ 6-107—6-144, 6-144.1; and Ord. No. 4369, adopted Nov. 21, 1988.

Charter reference— For Charter provisions as to authority of city council to grant, refuse or revoke licenses for the carrying on of any business in the city for which the state exacts a license tax, see Char., § 7. As to jurisdiction of municipal judge, and jurisdiction of court of common pleas and Circuit Court of Kanawha County, and judges thereof in vacation, with respect to enforcing city licensing ordinance, see Char., § 7-a.

Cross reference— Businesses, ch. 18.

State Law reference— Authority of city to impose business and occupation tax on businesses and occupation taxed by the state, see W. Va. Code § 8-13-5, as modified by W. Va. Code § 11-13-25; authority to impose business and occupation tax on businesses and occupations taxed by the state, W. Va. Code §§ 8-13-5, 11-13-25; state business and occupation tax, W. Va. Code § 11-13-1 et seq.

DIVISION 1. - GENERALLY

Sec. 110-31. - Definitions.

For the purpose of this article, the following words and phrases shall have the meanings respectively ascribed to them by this section:

Banking business; financial organization means any bank, banking association, trust, company, industrial loan company, small loan company or licensee, building and loan association, savings and loan association, finance company, investment company, investment broker or dealer, as well as every person engaging or continuing within the city the business of making loans of money, credit, goods or things, in action, who because of such activity is required under the laws of the state to obtain a license from the commissioner of banking of the state, and any other similar business organization, at least ninety percent of the assets of which consists of intangible personal property and at least ninety percent of the gross receipts of which consists of dividends, interest and other charges derived from the use of money or credit.

Business means all activities engaged in or caused to be engaged in with the object of gain or economic benefit, either direct or indirect. "Business" shall not include a casual sale by a person who is not engaged in the business of selling the type of property involved in such casual sale. "Business" shall include the production of natural resources or manufactured products which are used or consumed by the producer or manufacturer and shall include the activities of a banking business or financial organization.

Company; person means the term "person" or the term "company", herein used interchangeably, includes any individual, firm, copartnership, joint venture, association, corporation, trust, estate or any other group or combination acting as a unit, and the plural as well as the singular number, unless the intention to give a more limited meaning is disclosed by the context.

Contracting means to include the furnishing of work, or both materials and work, in the fulfillment of a contract for the construction, alteration, repair, decoration or improvement of a new or existing building or structure, or any part thereof, or for the alteration, improvement or development of real property.

Prime contractor means a person engaged in the business of performing for others, contracts for the construction, repairing, decorating or improving of new or existing buildings or other structures under, upon or above real property either for the work or for a specific portion thereof. The terms "prime contractor" and "subcontractor" include, but are not limited to, persons performing labor and services in respect to the moving of earth or clearing of land, razing or moving existing buildings or structures even though such services may not be done in connection with a contract involving the constructing, repairing, or altering of a new or existing building or structure.

Subcontractor means a person engaged in the business of performing a like or similar service for persons other than consumers, either for the entire work or for a specific portion thereof.

Buildings or structures means and includes, but is not limited to, everything artificially built up or composed of parts joined together in some definite manner and attached to real property. It includes not only buildings in the general and ordinary sense, but also tanks, fences, conduits, culverts, railroad tracks, overhead and underground transmission systems, tunnels, monuments, retaining walls, bridges, trestles, parking lots and pavement for foot or vehicular traffic.

Contracting, repairing, decorating or improving means of a new part of an existing building or structure or any part thereof, in addition to its ordinary meaning includes, but is not limited to, the installing or attaching of any article of tangible personal property in or to real property, whether or not such personal property becomes a part of the realty by virtue of such installation.

Speculative builder means and includes one who constructs improvements upon real property owned by him for sale or rental.

Fourth quarter [return] will be construed to mean the annual return of business and occupation taxes where the context so requires in this section.

Gross income means the gross receipts of the taxpayer, other than a banking or financial business, received as compensation for personal services and the gross receipts of the taxpayer derived from trade, business, commerce or sales and the value proceeding or accruing from the tangible property (real or personal) or service, or both, and all receipts by reason of the investment of the capital of the business engaged in, including rentals, royalties, fees, reimbursed costs or expenses or other emoluments, however designated, and including all interest, carrying charges, fees or other like income, however denominated, derived by the taxpayer from repetitive carrying of accounts, in the regular course and conduct of his business, and extension of credit in connection with the sale of any tangible personal property or service, and without any deduction on account of the cost of property sold, the cost of materials used, labor costs, taxes, royalties paid in cash or in kind or otherwise, interest or discount paid or any other expense whatsoever. "Gross income" of a banking or financial business is specified in section 110-60.

Gross proceeds of sales means the value, whether in money or other property, actually proceeding from the sale of tangible property, without any deduction on account of the cost of property sold or expenses of any kind.

Gross income and gross proceeds of sales means shall not be construed to include (1) cash discounts allowed and taken on sales; (2) the proceeds of sale of goods, wares or merchandise returned by customers when the sale price is refunded either in cash or by credit; (3) the amount allowed as "trade-

in value" for any article accepted as part payment for any article sold; (4) excise taxes imposed by the state; or (5) money or other property received or held by a professional person for the sole use and benefit of a client or another person or money received by the taxpayer on behalf of a bank or other financial institution for repayment of a debt of another; (6) excise taxes imposed by the federal government upon the consumer, not manufacturer, and which are held in trust by the vendor as agent for the federal government.

Sale; sales, selling means any transfer of the ownership of or title to property, whether for money or in exchange for other property.

Selling at wholesale; wholesale sales means (1) sales of any tangible personal property for the purpose of resale in the form of tangible personal property; (2) sales of machinery, supplies or materials which are to be directly consumed or used by the purchaser in the conduct of any business or activity which is subject to the tax imposed by this article; (3) sales of any tangible personal property to the United State of America, its agencies and instrumentalities, or to the state of West Virginia, its institutions or its political subdivisions.

Selling at retail means all sales other than wholesale sales are deemed to be retail sales. Sales to non-profit corporations are to be reported as retail sales.

Missionary representative means a full/part time employee, agent, representative, or independent contractor who performs work in the municipality as a field sales promotional representative, public relations orientated representative, goodwill emissary, merchandising expert or some combination thereof. The function of these missionary representatives can be generally described as assisting retailers/wholesalers in the display and merchandising of taxpayer's products in stores or insuring that the retailers/wholesalers have an ample stock of fresh products for sale.

Service business or calling means all activities engaged in by a person for other persons for a consideration, which involve the rendering of a service as distinguished from the sale of tangible property, but not including the services rendered by an employee to his employer. The term shall include, but not be limited to:

- (1) Persons engaged in manufacturing, compounding or preparing for sale, profit or commercial use articles, substances or commodities which are owned by another or others;
- (2) Persons engaged as independent contractors in producing natural resource products which are owned by another or others, as personal property, immediately after the same are severed, extracted, reduced to possession and produced; and
- (3) The repetitive carrying of accounts, in the regular course and conduct of business, and extension of credit in connection with the sale of any tangible personal property or service, except as to persons taxed pursuant to the provisions of section 110-60.

Taxpayer means any person liable for any tax hereunder.

Tax year; taxable year means either the calendar year, or the taxpayer's fiscal year when permission is obtained from the city collector to use the same as the tax period in lieu of the calendar year.

(Bill No. 6799, § 6-107, 1-22-2002)

Cross reference— Definitions generally, § 1-2

State Law reference— For similar definitions in the state business and occupation tax law, see W. Va. Code § 11-13-1. See also 110 C.S.R. 26 § 1a.25, and § 2e. As to definitions applicable throughout this Code, see § 1-2 of this Code.

Sec. 110-32. - Administration and enforcement.

- (a) The administration of this article is vested in, and shall be exercised by the city collector, who shall prescribe forms and reasonable rules of procedure in conformity with this article for making of return and for the ascertainment, assessment and collection of the taxes imposed hereunder; and the enforcement of any of the provisions of this article in any of the courts of the state shall be under the exclusive jurisdiction of the city collector, who shall require the assistance and act through the city solicitor or the assistant city solicitor.
- (b) Notwithstanding the foregoing, upon recommendation and request by the city collector, council may authorize any legal contractual arrangement it may deem appropriate with any individual, partnership, corporation, or other entity to assist the city collector in the assessment of any of the provisions of this article in any of the courts of this state the amount and method of compensation for said services to be determined by council.

(Bill No. 6799, § 6-144.1, 1-22-2002)

Cross reference— Administration, ch. 2.

Sec. 110-33. - Refunds and credits.

- (a) Any taxpayer claiming to have overpaid any tax, interest or penalty imposed by this article shall file his claim with the city collector within three years after the due date of the return determined by including any written authorized extension of time for filing, in respect of which the tax was imposed or within two years from the date the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within two years from the time the tax was paid, and not thereafter. Notwithstanding such period of limitation, the taxpayer may file a claim for refund within ninety days after a final determination by the state tax department of an overpayment in the taxpayers state business and occupation tax liability.
- (b) If, on such petition and the proofs filed in support thereof, the city collector shall be of the opinion that the tax, interest or penalty, or any part thereof, was overpaid, he shall refund the same to the taxpayer. If the city collector shall be in doubt as to whether or not there exists an overpayment, he may institute against the taxpayer a declaratory judgment proceeding in the circuit court of the county to ascertain whether or not there exists an overpayment of tax, interest or penalty, or any party thereof. If the city collector is of the opinion that there exists no overpayment of tax, interest or penalty, or any part thereof, he shall notify the taxpayer.
- (c) Taxpayer's failure to abide by express procedures contained in this section precludes taxpayer's claim for refund or credit.

(Bill No. 6799, § 6-137, 1-22-2002)

State Law reference— For state law as to refunds, see W. Va. Code § 11-10-14.

Sec. 110-34. - Offenses.

It shall be unlawful for any person to refuse to make the return required to be made in section 110-82, or to make any false or fraudulent return or false statement in any return with the intent to defraud the city, or to evade payment of the tax, or any part thereof, imposed by this article, or for the president, vice president, secretary, or treasurer of any corporation to make or permit to be made for any corporation or association any false return, or any false statement in any return required in this article, with the intent to evade the payment of any tax hereunder.

(Bill No. 6799, § 6-144, 1-22-2002)

State Law reference— For offenses against state business and occupation tax law see W. Va. Code § 11-9-4.

Sec. 110-35. - Revocation of licenses and permits.

- (a) The city collector has the authority to revoke any and all licenses and permits issued by the city in the event a licensee/permittee fails to file any city tax return or fails to pay any delinquent taxes, fees or any interest or penalty thereon due and owing to the city. The city collector has the authority to deny and prevent any and all licenses and permit privileges to those persons who are delinquent in paying taxes, fees or any interest or penalty thereon due and owing the city.
- (b) In the event of revocation, the city collector will provide written notice to the licensee/permittee at least five days prior to the contemplated revocation and such notice shall be served by certified mail. The notice shall indicate the time and the place of the revocation review meeting, the general grounds of said contemplated revocation, and shall advise the licensee/permittee of his/her rights to appear at said hearing in person and represented by legal counsel, and to be heard orally upon the merits of his/her defense. The city collector may request legal advice from the city attorney's office, and adopt such procedures for its decorum and the dispatch of business at such hearings as he/she may regard advisable. The revocation decision of the city collector will be final; provided, that those licensees/permittees who are subject to administrative or judicial appeals, pursuant to sections 110-113 through 110-115, may utilize these procedures in accordance with the Code, but will not be grounds to delay the revocation process.
- (c) Each license or permit that has been revoked pursuant to this section may be re-issued upon payment of all delinquent B&O taxes, fees or any interest or penalty thereon due and owing to the city.

(Bill No. 6799, § 6-136.1, 1-22-2002)

Sec. 110-36. - Records.

A person liable for B&O taxes shall keep and may be asked to produce all relevant records for ten years.

(Bill No. 6799, § 6-144.3, 1-22-2002)

Secs. 110-37—110-50. - Reserved.

DIVISION 2. - TAX IMPOSED; EXEMPTIONS AND CREDITS

Sec. 110-51. - Imposition of privilege tax.

- (a) There are hereby levied and imposed and shall be collected annual privilege taxes, against the persons, on account of the business and other activities and in the amounts to be determined by the application of rates against values or gross income or gross proceeds as set forth in sections 110-52 to 110-60, inclusive.

- (b) If any person liable for any tax under section 110-52 or 110-53 shall ship or transport his products, or any part thereof, out of the city without making sale of such products, the value of the products in the condition or form in which they exist immediately before transportation out of the city shall be the basis for the assessment of the tax imposed in those sections.
- (c) Gross income included in the measure of the tax under section 110-52 or 110-53, except in the production of natural gas, shall neither be added nor deducted in computing the tax levied under the other sections of this article.
- (d) In determining value, however, as regards sales from one to another of affiliated companies or persons, or under other circumstances where the relation between the buyer and the seller is such that the gross proceeds from the sale are not indicative of the true value of the subject matter of the sale, the value upon which such privilege tax shall be levied shall correspond as nearly as possible to the gross proceeds from the sale of similar products of like quality or character where no common interest exists between the buyer and the seller but where the circumstances or conditions are otherwise similar.
- (e) Sufficiency of contacts. The municipal business and occupation tax is imposed on each person engaged in privileges taxable under this article if such person is engaged in purposive revenue generating activities within the municipal limits of the city and such person has sufficient contacts to sustain the city's taxing jurisdiction. By way of example (but not limitation), if a person's activities within the city contributes to the establishment and maintenance of a market, such contacts are considered to be sufficient to sustain the city's taxing jurisdiction assuming federal constitutional nexus standards are satisfied.

(Bill No. 6799, § 6-108, 1-22-2002)

State Law reference— For corresponding provisions of state business and occupation tax law, see W. Va. Code § 11-13-2.

Sec. 110-52. - Producers of natural resource products.

- (a) Upon every person engaging or continuing within the city in the business of severing, extracting, mining, quarrying, reducing to possession and/or producing for sale, profit or commercial use any natural resource products, the amount of such tax shall be equal of the value of the articles produced as shown by the gross proceeds derived from the sale thereof by the producer, except as hereinafter provided, multiplied by the respective rates as follows: coal, one percent; limestone or sandstone quarried or mined, one percent; oil, one percent; natural gas in excess of the value of \$5,000.00, one percent; blast furnace slag, one percent; sand gravel or other mineral products, not quarried or mined, one percent; timber one percent, and other natural resource products, one percent.
- (b) The measure of this tax is the value of the entire production in the city, regardless of the place of sale or the fact that delivery may be made to points outside the city.
- (c) A person exercising privileges taxable under this section and using or consuming the same in his business or transferring or delivering the same as any royalty paid, in kind, or the like, shall be deemed to be engaged in the business of producing natural resources and shall be required to make returns on account of the production of the business, showing the gross proceeds or equivalent in accordance with uniform and equitable rules for determining the value upon which privilege taxes shall be levied, corresponding as nearly as possible to the gross proceeds from the sale of similar products of like quality or character by other taxpayers.

- (d) Persons who produce natural resource products outside the city and who make sale of the same within the city shall not pay the tax imposed by this section but shall pay the tax imposed by section 110-54 for the privilege of selling such products within the city.
- (e) A person exercising any privilege taxable under this section and engaging in the business of selling his natural resource products at retail in the city shall be required to make returns of the gross proceeds of such retail sales and pay the tax imposed in section 110-54 for the privilege of engaging in the business of selling such natural resource products at retail in the city. In addition, any person exercising any privilege taxable under this section and engaging in the business of selling his natural resource products to producers of natural resources, manufacturers, wholesalers, jobbers, retailers or commercial consumers for use or consumption in the purchaser's business shall be required to make returns of the gross proceeds of such wholesale sales and pay the tax imposed in section 110-54.

(Bill No. 6799, § 6-109, 1-22-2002)

State Law reference— For corresponding provisions of state business and occupation tax law, see former W. Va. Code § 11-13-2a, made inoperative as of July 1, 1987, by W. Va. Code § 11-13-28.

Section. 110-53. - Manufacturing, compounding or preparing products.

- (a) Upon every person engaging or continuing within the city in the business of manufacturing, compounding or preparing for sale, profit or commercial use, either directly or through the activity of others, in whole or part, any article or articles, substance or substances, commodity or commodities, or newspaper publishing (including all gross income or proceeds of sale from circulation and advertising), except electric power produced by public utilities or others, the amount of the tax shall be equal to the value of the article, substance, commodity or newspaper manufactured, compounded or prepared for sale, as shown by the gross proceeds derived from the sale thereof by the manufacturer or person compounding or preparing the same, except as otherwise provided, multiplied by a rate of thirty one-hundredths of one percent: Provided, that effective January 1, 2014, this rate of tax shall be reduced to zero on the privilege of manufacturing, compounding or preparing exercised on and after said January 1, 2014.
- (b) A person exercising any privilege taxable under this section, and engaging in the business of selling his product at wholesale in the city shall be required to make returns of the gross proceeds of such wholesale sales and pay the tax imposed by this section at the rate set forth in section 110-53 for the privilege of engaging in the business of selling such manufactured goods in the city.
- (c) The measure of the tax in this section is the value of the entire product manufactured, compounded or prepared in the city for sale; profit or commercial use, regardless of the place of sale or the fact that deliveries may be made to points outside the city.
- (d) It is further provided, however, that in those instances in which the same person partially manufactures, compounds or prepares products within the city and partially manufactures, compounds or prepares such products outside the city, the measure of his tax under this section shall be that proportion of the sales price of the product that the payroll costs of manufacturing within the city bears to the entire payroll costs of manufacturing the product.
- (e) A person exercising any privilege taxable under this section and engaging in the business of selling his product at retail in the city shall be required to make returns of the gross proceeds of such retail sales and pay the tax imposed in section 110-54 for the privilege of engaging in the business of selling such products at retail in the city.

- (f) The dressing and processing of food intended for human consumption by a person, or the cooking and serving of food by a restaurant which food is to be sold in the city by such person, shall not be considered manufacturing or compounding or preparing for sale, but the sale of these products shall be reported under section 110-54 either as wholesale or retail sale, as the case may be.
- (g) Persons who manufacture, compound or prepare products outside the city and who make sale of the same within the city shall not pay the tax imposed by this section but shall pay tax imposed by section 110-54 for the privilege of selling such product within the city. If any person shall ship or transport his products or any part thereof out of the state without making sale of such products, the value of the products in the condition or form in which they exist immediately before transportation out of the state shall be the basis for the assessment of the tax imposed. The city collector shall prescribe equitable and uniform rules of ascertaining such value. To determine whether freight charges are deductible, see § 110-26-2b.6 of the Code of State Regulations.

(Bill No. 6799, § 6-110, 1-22-2002; Bill No. 7578, § 1, 5-20-2013)

State Law reference— For corresponding provisions of state business and occupation tax law, see former W. Va. Code § 11-13-2b, made inoperative as of July 1, 1987, by W. Va. Code § 11-13-28.

Sec. 110-54. - Business of selling tangible property; certain sales exempt.

- (a) Upon every person engaging or continuing within the city in the business of selling any tangible property whatsoever, real or personal, including the sale of food in hotels, restaurants, cafeterias, confectioneries and other public eating houses and wholesale sales from a rolling stockpile, except sales of any person engaging or continuing in the business of horticulture, agriculture or grazing, or selling stocks, bonds, or other evidence of indebtedness, there is hereby levied, and shall be collected, a tax equal to 5/10 of one percent of the gross income of the business; except, therein the case of selling at wholesale, the tax shall be equal to three-twentieths of one percent of the gross income of the business.
- (b) Gross income or gross proceeds of sales derived from sales within West Virginia, which is not taxed or taxable by any other municipality are included in the measure of city business and occupation tax if the sales are either directed from a city location or the taxpayer's principal West Virginia office is located in the city. Without limiting the generality of the foregoing, when the taxpayer has only one office location and this office is located within the municipal limits of the city and its activities elsewhere in West Virginia are neither taxed nor taxable by another municipality, the gross income or gross proceeds from those activities are taxable by the city.
- (c) A person exercising any privilege taxable under section 110-53, and engaging in the business of selling his manufactured products in the city, shall be required to make returns of the gross proceeds of such wholesale sales and pay the tax imposed by this section at the rate of three-twentieths of one percent for the privilege of engaging in the business of selling such manufactured products in the city.
- (d) All sales of real estate (such as by a speculative builder) are sales at retail and must be reported accordingly. On sales of realty, the status of the purchaser or the intention or use made of the property by the purchaser is of no consequence to the vendor's tax status. To illustrate; where a speculative builder constructs apartment buildings which he later sells to a tax exempt entity, such sales must be reported at retail on the tax return of the speculative builder.
- (e) Casual sales of real estate are not taxable to the vendor.
- (f)

Sales of tangible personal property made by vendors to persons engaging in exempt business activities (e.g., non profit hospitals and the activities of agriculture, horticulture, grazing) are not exempt sales and the gross income derived from such sales must be reported by the vendor under the retail classification. This rule results from the fact that the purchaser (non-profit hospital, farmer, etc.) is not engaged in a business subject to the municipal business and occupation tax.

- (g) All sales made through vending machines are sales at retail. The term "vending machines" means and includes only those machines which, through the insertion of a coin of a specified amount, will return to the vendee a predetermined specific article of merchandise. It includes, but is not limited to, machines which vend cigarette, toilet articles, sandwiches, beverages, candies, confections, et cetera.
- (h) Persons domiciled outside the city limits of the city who solicit sales within the city and sell tangible personal property of the city are doing business in the city, irrespective of the domicile of such persons irrespective of whether or not such persons maintain a permanent place of business in the city and irrespective of how a sales order is transmitted or processed. If an order is placed in connection with solicitation by a representative (regardless whether there is an employment or agency relationship or whether acting as an independent contractor) who solicits orders within the city, and the tangible personal property is to be delivered in the city, then the gross proceeds of such sales are included in the measure of the city's business and occupation tax.

(Bill No. 6799, § 6-111, 1-22-2002)

State Law reference— For corresponding provisions of state business and occupation tax law, see former W. Va. Code § 11-13-2c, made inoperative as of July 1, 1987, by W. Va. Code § 11-13-28, See also 110 C. S. R. 26 § 2C.4.3 - 4.6

Sec. 6-110-55. - Public service or utility business.

Upon any person engaging or continuing within the city in any public service or utility business, except railroad, railroad car, express, pipeline, telephone and telegraph companies, water carriers by steamboat or steamship and motor carriers, there are levied, and shall be collected, taxes on account of the business engaged in equal to the gross income of the business multiplied by the respective rates as follows: Water companies, four percent; electric light and power companies, four percent on sales and demand charges for domestic and commercial lighting and three percent on sales and demand charges for all other purposes; natural gas companies, three percent of the gross income, such gross income for this purpose to be determined by deducting from gross income from all sales of gas to consumers the amount of the tax paid by the taxpayer under section 110-52 upon the production of the same gas; and upon all other public service or utility business, 235/100 percent. The measure of this tax shall not include gross income derived from commerce between the state and other states of the United States. The measure of the tax under this section shall include only gross income received from the supplying of public service. The gross income of the taxpayer from any other activity shall be included in the measure of the tax imposed upon such other activity by the appropriate section of this article.

(Bill No. 6799, § 6-112, 1-22-2002)

State Law reference— For corresponding provisions of state business and occupational tax law, see W. Va. Code § 11-13-2d.

Sec. 110-56. - Business of contracting.

- (a) *Upon every person engaging or continuing within the city in the business of contracting, the tax shall be equal to two percent of the gross income of the business.* A person performing any contracting activity shall report his/her gross income therefrom under the contracting classification of the municipal business and occupation tax return and shall receive no deduction from gross income on the account of any expenses incurred. All income derived from said activity shall be reported under the contracting classification, and the form of contract entered into by the parties shall not be determinative of taxable classification.
- (b) *Form of contract.* Persons engaged in the contracting business shall report the entire gross income under the contracting classification, regardless of whether the contract is a turnkey contract, lump sum contract, per unit contract, cost plus fixed fee contract, or other contract having a similar basis. Gross income received from a contracting activity must be reported under the contracting classification and the manner of performance, basis of determining cost, fee or income or form of contract shall not alter the definition of contractor or of contracting and shall not change the taxability of such income from the contracting classification to another classification. A contracting activity remains a contracting activity regardless of what the parties may name it and regardless of the manner in which the parties may make payment and perform work.
- (c) *Costs.* The measure of the tax under the contracting classification is gross income and includes all items of cost where the contractor has incurred liability. The cost of materials and labor can only be exempted from the measure of the tax in those cases where the contractor is not liable to vendors or workmen for payment. In those cases where the contractor contends that he/she has not incurred a municipal business and occupation tax liability because he/she acted solely as a agent for the owner, the burden of proving alleged principal-agency relationship shall be upon the contractor.
- (d) *Separate contracts for labor and materials.* In cases where the contractor enters into a separate contract for the furnishing of materials by the contractor and a separate contract for erection of such materials by the contractor, the gross income from both contracts is taxable under the contracting classification, unless it can be provided by the contractor that passage of title of the materials was not dependent upon the erection of the materials by the contractor and that the sale of such materials is, in fact, a separate and distinct transaction, taxable under the municipal business and occupation tax law, as a retail or wholesale sale, as the case may be. The contract to furnish materials shall not be considered a separate and distinct transaction from the contract to erect the same, unless it is established by the contractor to be a complete arm's length transaction with no dependency existing between the contract for materials and the contract for erection. The burden of proving any alleged arm's length transaction shall be upon the contractor.
- (e) *Separate purchase orders.* A separate purchase order for the furnishing of work or labor and a separate purchase order for the furnishing of materials which constitutes the contract(s) between the parties shall be treated in the same manner as set forth in the paragraph above.
- (f) *Prime and subcontractors.* A prime contractor, one who furnishes work or both materials and work under a written or oral contract, for the construction, alteration, repair, decoration or improvement of a new or existing building or structure or any part thereof, or for the alteration, improvement or development of realty, must report his/her gross income under the contracting classification without any deduction on account of any expenses incurred. If the prime contractor

executes a contract with another for a portion of the job or project, the prime contractor receives no deduction from gross income on account of any payment made to the subcontractor. The subcontractor will also be taxed on his/her gross income under the contracting classification.

- (g) *Contract entered into with government.* Gross income received by a person for contracting activities performed for the State of West Virginia, the federal government or any of their instrumentalities, agencies, boards, commissions or political subdivisions, etc., or performed for nonprofit organizations is taxable and shall be reported under the contracting classification. The fact that the owner is a governmental unit or a non profit organization does not relieve the contractor, subcontractor, supplier or any other person from liability for municipal business and occupation tax on the full amount of gross income.

(Bill No. 6799, § 6-113, 1-22-2002)

State Law reference— For corresponding provisions of state business and occupation tax law, see former W. Va. Code § 11-13-2c, made inoperative as of July 1, 1987, by W. Va. Code § 11-13-28, See also 110 C. S. R. 26 § 2C.4.3 - 4.6

Sec. 110-57. - Business of operating amusements.

Upon every person engaging or continuing within the city in the business of operating a theater, opera house, moving picture show, vaudeville, amusement park, carnival, circus, dance hall, skating rink, racetrack, radio broadcasting station or any other place at which amusements are offered to the public, the tax shall be equal to 5/10 of one percent of the gross income of the business.

(Bill No. 6799, § 6-114, 1-22-2002)

Cross reference— Businesses, ch. 18.

State Law reference— For corresponding provisions of state business and occupation tax law, see Former W. Va. Code § 11-13-2g, made inoperative as of July 1, 1987, by W. Va. Code § 11-13-28.

Sec. 110-58. - Service business or calling not otherwise specifically taxed.

- (a) Upon every person engaging or continuing within the city in any service business or calling not otherwise specifically taxed under this article, there is hereby levied, and shall be collected, a tax equal to one percent of the gross income of any such business.
- (b) Gross income or gross proceeds of sales derived from services within West Virginia which is not taxed or taxable by any other municipality are included in the measure of the city business and occupation tax if the services are either directed from a Charleston location or the taxpayer's principal West Virginia office is located in the city. Without limiting the generality of the foregoing, when a taxpayer has only one (1) office location and this office is located within the municipal limits of the city and its activities elsewhere in West Virginia are neither taxed nor taxable by another municipality, the gross income or gross proceeds from those activities are taxable by the city.

(Bill No. 6799, § 6-115, 1-22-2002)

State Law reference— For corresponding provisions of state business and occupation tax law, see former W. Va. Code § 11-13-2h, made inoperative as of July 1, 1987, by W. Va. Code § 11-13-28.

Sec. 110-59. - Business of furnishing property for hire.

- (a)

Upon every person engaging or continuing within the city in the business of furnishing any real or tangible personal property which has a tax situs in the city, or any interest therein, for hire, loan, lease or otherwise, whether the return is in the form of rentals, royalties, fees or otherwise, the tax shall be one percent of the gross income of any such activity.

- (b) The term "tangible personal property", as used herein, shall not include money or public securities.

(Bill No. 6799, § 6-116, 1-22-2002)

State Law reference— For corresponding provisions of state business and occupation tax law, see former W. Va. Code § 11-13-2h, made inoperative as of July 1, 1987, by W. Va. Code § 11-13-28.

Sec. 110-60. - Banking and other financial businesses; findings of city council.

- (a) Upon every person engaging or continuing within the city in the business of banking or financial business, from and after July 1, 1971, the tax shall be equal to one percent of the gross income received from interest, premiums, discounts, dividends, service fees or charges, commissions, fines, rents from real or tangible personal property, however denominated, royalties, charges for bookkeeping or data processing, receipts from check sales, charges or fees, and receipts from the sale of tangible personal property; provided, that gross income shall not include (a) interest received on the obligations of the United States, its agencies and instrumentalities; (b) interest received on the obligations of this or any other state, territory or possession of the United States, or any political subdivision of any of the foregoing or of the District of Columbia; or (c) interest received on investments or loans primarily secured by first mortgages or deeds of trust on residential property occupied by nontransients; provided further, that all interest derived on activities exempt under (c) above, shall be reported, as to amounts, on the return of a person taxable under the provision of this section.
- (b) Gross income of a banking or financial business, from whatever source derived, shall be taxable under this section only, and persons taxed pursuant to the provisions of this section shall not be taxed under sections 110-52 to 110-55, inclusive.
- (c) The city council hereby finds and declares that it is the intent of the council to subject national banking associations and other financial organizations to the tax imposed by this article, in accordance with the authorization contained in Section 5219 of the Revised Statutes of the United States as amended by Public Law 91-156, enacted December 24, 1969.
- (1) *Standards for reporting banking business income.* Each person engaging in banking business in the city that also maintains a banking location outside the city shall make a good faith allocation of its gross income in accordance with this article, subject to the approval of the city collector. Each person subject to this regulation shall report gross income for the city municipal business and occupation tax purposes to reflect all gross income generated from loans originated and services provided to customers at or through each banking location within the municipal limits of the city and each such person's report shall fully reflect gross income earned from investments (other than loans) funded by deposits and repurchase agreements regularly maintained at or through each banking location within the municipal limits of the city. Other gross income shall be allocated in a reasonable manner that attributes all income to banking locations. No allocation methodology used to make such a report shall allocate or apportion gross income to locations other than a banking location.
- (2) Without limiting the generality of the foregoing:

- a. The phrase "banking location" (and all derivations thereof) means a physical facility maintained by a person engaged in banking business at which customers normally personally visit to conduct typical banking transactions, such as opening accounts, originating loans, making deposits, etc.
 - b. Gross income from loans is reportable (without adjustment, apportionment or allocation) to the banking location at which the loan originates. The transfer of loan files to a location outside of a municipality for processing or collection does not alter the taxability of the interest from such loans with respect to the banking location at which such loans originate.
 - c. Gross income from investments (other than loans) acquired or funded from deposits or repurchase agreements is reportable to banking location(s) in which deposits giving rise to the income are maintained, regardless of whether the investments function is managed or directed at a separate location. Deposits and repurchase agreements are considered maintained only at banking locations in accordance with reasonable procedures that reflect typical customer deposit activities and repurchase agreement relationships maintained at banking locations of the taxpayer subject to the approval of the city collector. Gross income from investments (other than loans) acquired or funded from sources other than deposits or repurchase agreements shall be reported to banking location(s) in a reasonable manner that fairly allocates all such gross income to banking locations.
 - d. Gross income from fees is reportable to the banking location at which the activity giving rise to the fee is primarily undertaken, using a reasonable method that fully reports fee income to one or more banking locations.
- (3) The city collector of the city shall have authority to review and approve reasonable allocation methods in accordance with this ordinance.
 - (4) Each person subject to this regulation shall establish and maintain sufficient records for review by the city collector and his or her designee as long as the contents of such records may be material in the administration of the municipal business and occupation tax of the city along with such additional information as may otherwise be required. Each person subject to this regulation shall file reports on such forms designed from time to time by the city collector and shall follow all instructions in connection therewith.

(Bill No. 6799, § 6-117, 1-22-2002)

State Law reference— For corresponding provisions of state business and occupation tax law, see former W. Va. Code § 11-13-2k, made inoperative as of July 1, 1987, by W. Va. Code § 11-13-28.

Sec. 110-61. - Persons taxable on multiple activities—Credits.

- (a) A person taxable under section 110-54 with respect to selling products at wholesale in the city shall be allowed a non-refundable credit against those taxes for any:
 - (1) Manufacturing taxes paid by such person with respect to the manufacturing of products so sold at wholesale in this city; and/or
 - (2) Extracting taxes paid by such person with respect to the extracting of products so sold at wholesale in this city or ingredients of products so sold at wholesale in this city.
- (b) For purposes of this section:
 - (1)

Manufacturing tax means a gross receipts tax imposed by a municipality or other local government unit on the act or privilege of engaging in the business as a manufacturer and includes (i) the tax imposed on section 110-53 and (ii) similar gross receipts taxes paid to the municipalities or other local government units (other than state governments) within the United States.

- (2) *Extracting tax* means a gross receipts tax imposed by a municipality or other local government unit on the act or privilege of engaging in the business as a producer of natural resource products and includes (i) the tax imposed in section 110-52 and (ii) similar gross receipts taxes paid to other municipalities or other local government units within the United States (other than state governments) within the United States.
- (3) *Gross receipts tax* means a tax which (i) is imposed on or measured by the gross volume of business in terms of gross receipts or in other terms and in the determination of which deductions allowed would not constitute the tax an income tax or value added tax and (ii) which is not, pursuant to law or custom, separately stated from the sales price.

(Bill No. 6799, § 6-118, 1-22-2002)

Sec. 110-62. - Tax rate for HMO.

The rate of municipal business and occupation or privilege tax on the activity of a health maintenance organization holding a certificate of authority under the provisions of W. Va. Code ch. 33, art. 25a, [§ 33-25A-1 et seq.], shall not exceed one half of one percent to be applied solely to that portion of gross income received from the medicaid program pursuant to Title XIX of the Social Security Act, the state employee programs administered by the public employee insurance agency pursuant to article sixteen [§ 5-16-1 et seq.], chapter five of the West Virginia Code, and other federal programs, for health care items or services provided directly or indirectly by the health maintenance organization that is expended for administrative expenses; and shall not exceed one-half of one percent to be applied to the gross income received from enrollees, or from employers on behalf of enrollees, from sources other than medicaid, state employee programs administered by the public employees insurance agency and other federal programs for health care items or services provided directly or indirectly by the health maintenance organization: provided, that this tax rate limitation shall not extend to that part of the gross income of health maintenance organizations which is received from the use of real property other than property in which any such company maintains its office or offices in the municipal limits of the city, whether such income is in the form of rentals or royalties.

(Bill No. 6799, § 6-119, 1-22-2002)

Sec. 110-63. - Exemptions.

(a) The provisions of this article shall not apply to:

- (1) Insurance companies which pay the state a tax upon premiums; provided, that such exemption shall not extend to that part of gross income of insurance companies which is received for the use of real property, other than property in which any such company maintains its office or offices, in the city, whether such income is in the form of rentals or royalties;
- (2) Nonprofit cemetery companies organized and operated for the exclusive benefit of their members;
- (3)

Fraternal societies, organizations and associations organized and operated for the exclusive benefit of their members and not for profit; provided, that this exemption shall not extend to that part of gross income arising from the sale of alcoholic liquor, food and related services of such fraternal societies, organizations and associations which are licensed as private clubs under the provisions of W. Va. Code ch. 60, art. 7;

- (4) Corporations, associations and societies organized and operated exclusively for religious or charitable purposes;
 - (5) Production credit associations, organized under the provisions of the federal Farm Credit Act of 1933; provided, that the exemptions of this section shall not apply to corporations or cooperative associations organized under the provisions of W. Va. ch. 19, art. 4;
 - (6) Any credit union organized under the provisions of chapter 31 or any other chapter of the Code of West Virginia; provided, that the exemptions of this section shall not apply to corporations or cooperative associations organized under the provisions of W. Va. ch. 19, art. 4;
 - (7) Gross income derived from advertising service rendered in the business of radio and television broadcasting;
 - (8) The gross income or gross proceeds of sale of a gasification or liquefaction of coal project in the demonstration, pilot or research states; provided, that prior to the commencement of operation of any such project, the tax commissioner of the state shall have first certified the project as eligible for such exemption; provided, further, that such exemption shall expire seven years from the date the project first receives gross income or gross proceeds from sales; and
 - (9) The gross income or gross proceeds of sale derived from sales or services by an itinerant vendor or a street vendor in cases where no itinerant vendor license or street vendor license is required by City Code sections 18-613 or 18-1033.
- (b) An organization is "charitable" for purposes of (4) above it satisfies both of the following criteria: (1) it is exempt from Federal Tax, under 26 U.S.C. § 501(c)(3), and (2) its purposes include relief of poverty, advancement of education, advancement of religion, promotion of health, governmental or municipal purposes, or other purposes that are beneficial to the community.

(Bill No. 6799, § 6-120, 1-22-2002, Bill. No. 7225, 9-5-2006)

State Law reference— For corresponding provisions of state business and occupation tax law, see W. Va. Code § 11-13-3 and *Hardesty v. Aracoma*, 129 S. E. 2d 921(1963). *Town of Burnsville v. Kwik-Pick, Inc.*, 408 S. E. 2d 646 (W. Va. 1991).

Secs. 110-64—110-80. - Reserved.

DIVISION 3. - PAYMENTS, RETURNS AND RECORDS

Sec. 110-81. - Tax cumulative.

- (a) The tax imposed by this article shall be in addition to all other licenses and taxes levied by law as a condition precedent to engaging in any business, trade, calling or activity. A person exercising a privilege taxable under this article, subject to the payment of all licenses and charges which are a condition precedent to exercising the privilege tax, may exercise the privilege for the current tax year upon the condition that he shall pay the tax accruing under this article.
- (b) *Computation of tax.*
 - (1)

The taxes levied hereunder shall be due and payable in quarterly installments on or before the expiration of one month from the end of the quarter in which they accrue. The taxpayer shall, within one month from the expiration of each quarter, make a return reporting the tax for which he/she is liable for such quarter; sign it and mail it, together with any remittance due, in the form required by section 110-82 of the amount of the tax to the office of the city collector. In reporting and remitting the amount of the tax due for each quarter, the taxpayer may deduct one-fourth of the total exemption allowed for the year. When the total tax for which any person is liable under this article does not exceed the sum of \$200.00 in any year, the taxpayer may pay the tax quarterly as aforesaid or, with the consent in writing of the city collector, at the end of the month next following the close of the tax year.

- (2) The city collector, if he deems it necessary, based upon past experience with a taxpayer, based on the past practices of a taxpayer, based on the financial condition of the taxpayer, or based on the size of the contract, in order to insure payment of the taxes levied hereunder, may require return and payment under this section for other than quarterly periods. Furthermore, if the city collector deems it necessary to insure payment of the business and occupation tax, he may require a deposit to be paid by the taxpayer prior to when the taxes accrue and are otherwise payable. The amount of the deposit shall be determined and/or based upon the taxpayer's projected gross income or gross proceeds of sale for the applicable tax period. This deposit shall be paid to the office of the city collector, at a date and time, and in a manner determined by the city collector.
- (3) Every contractor whose principal business location is outside of the city, shall register with the city collector prior to engaging in the performance of a contract in this city, and the city collector, if he deems it necessary, based on the past experience with a taxpayer, based on the past practices of a taxpayer, based on the financial condition of the taxpayer, or based on the size of the contract, in order to insure payment of the taxes levied hereunder, may also require the following:
 - a. At the time of registration, each contractor shall deposit with the city collector six percent of the amount the contractor is to receive for the performance of the contract, which sum shall be held within a contractor's use tax fund pending the completion of the contract.
 - b. In lieu of the six percent deposit, each contractor may request the approval of the city collector to provide, in the alternative, a corporate surety bond to be approved by the city collector as to form, sufficiency, value, amount, stability, and other features necessary to provide a guarantee of payment of the tax due the city.

(Bill No. 6799, § 6-121, 1-22-2002; Bill No. 7133, 3-7-2005)

Sec. 110-82. - Return and remittance; tax year.

- (a) On or before 31 days after the end of the tax year, each person liable for the payment of a tax under section 110-51 shall make a fourth quarter return, showing the gross proceeds of sale or gross income of business, trade, calling or activity, computing the amount of tax chargeable against him in accordance with the provisions of this article and transmit with his report a remittance in the sum required by this section, covering the remainder of the tax chargeable against him, in the office of the city collector. Such returns shall be verified by the oath of the taxpayer, if made by an individual, or by the oath of the president, vice president, secretary or

treasurer of a corporation, if made on behalf of the corporation. If made on behalf of a partnership, joint venture, association, trust or any other group or combination acting as a unit, any individual delegated by such firm, group or unit shall take the oath on behalf of the taxpayer.

- (b) The assessment of taxes herein made and the returns required therefore shall be for the year ending December 31. If the taxpayer, in exercising a privilege taxable under this article, keeps the books reflecting the same on the basis other than the calendar year, he may with the written consent of the city collector, make his annual returns and pay taxes for the year covering his accounting period, as shown by the method of keeping his books.
- (c) All remittances of taxes imposed by this article shall be made to the city collector, in lawful money of the United States or by bank draft, certified check, cashier's check, money order or certificate of deposit, who shall pay the money into the city treasury, to be kept and accounted for as provided by law.

(Bill No. 6799, § 6-122, 1-22-2002)

State Law reference— For corresponding provisions of state business and occupation tax law, see W. Va. Code §§ 11-13-5, 11-13-9.

Sec. 110-83. - Extensions of time; payment plans.

- (a) The city collector, upon approval from city manager, may grant a reasonable extension of time for payment of tax or any installment, or for filing the fourth quarter return or quarterly return required pursuant to this article, on such terms and conditions that he may require. No such extensions shall exceed six months.
- (b) The city collector, upon approval from city manager, may extend the time for payment of an amount determined as a deficiency for a period not to exceed 12 months from the date designated for payment of the deficiency. An extension of this time may be granted only where it is clearly established to the satisfaction of the city collector that the payment of a deficiency upon the date designated for payment would result in undue hardship.
- (c) If any extension of time is granted for payment of any tax or deficiency, the city collector may require the taxpayer to furnish a bond or other security, in an amount not exceeding twice the amount for which the extension of time for payment is granted on such terms and conditions as the city collector may require.

(Bill No. 6799, § 6-123, 1-22-2002)

Sec. 110-84. - Records, statements, and investigations.

- (a) For the purpose of ascertaining the correctness of a tax return or an assessment for the purpose of making an estimate of any taxpayer's liability for the tax administered under this article, the city collector shall have the power to examine or cause to be examined, by any agent or representative designated by the city collector, any books, papers, records, memoranda or other documents bearing upon the matters required to be included in the return and may require the attendance of the person rendering the return or the attendance of any other person having knowledge of the matters contained therein. In connection therewith, the city collector may take testimony and shall have the power to administer an oath to such person.
- (b)

The city collector may prescribe rules and regulations as to the keeping of records, the content and form of returns and the filing of copies of city business and occupation tax returns and determinations. The city collector may require any person, by notice served upon such person, to make such returns and keep such records as the city collector may deem sufficient to show whether or not such person is liable under this article for such tax.

- (1) *Subpoenas.* The city collector has the power to issue subpoenas and subpoenas duces tecum to compel the attendance of witnesses and production of documents for the purpose of ascertaining the correctness of a tax return or for performing an assessment or for any hearing held by the tax collector. In case of the failure or refusal of a witness to appear and testify or to produce evidence, the city collector may invoke the aid of the Kanawha County Circuit Court. Upon proper showing, the city collector may apply for an order requiring the witness to appear and give testimony and produce evidence concerning the matter in question.

(Bill No. 6799, § 6-124, 1-22-2002)

State Law reference— For state law as to administration of state business and occupation tax law, see W. Va. Code §§ 11-10-5, 11-10-5a.

Sec. 110-85. - Secrecy of returns.

- (a) Except when required in an official investigation or hearing or proceeding to ascertain or collect the amount of tax due, or pursuant to an exemption listed in W. Va. Code § 11-10-5d, it shall be unlawful for any officer or employee of the city to divulge or make known in any manner the tax return, or any part thereof, of any individual, firm or corporation, or disclose information concerning the personal affairs of any individual or the business of any single firm or corporation, or disclose the amount of income or any particulars set forth or disclosed in any report, declaration or return required to be filed with the city collector by any article of this chapter imposing any tax administered under this article, or by any rule or regulation of the city collector issued thereunder.
- (b) Any person protected by the provisions of this article may, in writing, waive the secrecy provisions of this section for such purpose and such period as he shall therein state, and the city collector, if he so determines, may thereupon release to designated recipients such taxpayer's return or other particulars filed under the provisions of the tax articles administered under the provisions of this article.

(Bill No. 6799, § 6-125, 1-22-2002)

Sec. 110-86. - Reciprocal exchange.

The city collector may permit the proper officer, or his authorized representative, of the United States or the state, or any political subdivision of the state, to inspect returns filed with the city collector or may furnish to such officer or representative a copy of any such return; provided, that such other jurisdiction grants similar privileges to the city collector.

(Bill No. 6799, § 6-127, 1-22-2002)

State Law reference— For state law as to duty of state tax commissioner to permit municipal officers to inspect state gross sales tax returns, see W. Va. Code § 11-10-5d.

Sec. 110-87. - Unlawful release of tax information; penalties.

- (a) It shall be unlawful for any officer or employee of the city to release to any person any tax information obtained by virtue of a Reciprocal Exchange of Tax Information Agreement between the State of West Virginia and the city unless the person receiving the information is the authorized counsel of the State of West Virginia or the city and shall be using the information only for the purpose of administering business and occupation taxes or carrier income taxes, or the person who filed the return has authorized, in writing its release, thereby waiving his right to secrecy.
- (b) This section shall not be construed to prohibit the publication or release of statistics so classified as to prevent the identification of particular reports and the items thereof.

(Bill No. 6799, § 6-126, 1-22-2002)

Sec. 110-88. - Mathematical errors; collection of balance due on return without remittance.

- (a) Where a mathematical error appears on a return (including an overstatement of the credit for the amount paid as a quarterly installment,) the city collector shall correct such error and notify the taxpayer, in writing, of the deficiency in the tax. The taxpayer shall have ten days after receipt of such notice within which to pay such deficiency. If the taxpayer fails to pay such deficiency within ten days, the city collector shall make an assessment of such deficiency in accordance with section 110-112 and shall give the taxpayer written notice thereof.
- (b) If the taxpayer files a mathematically correct fourth quarter return which reflects a balance due of the tax administered under this article; and if full payment thereof has not been made, the city collector shall notify the taxpayer, in writing, of the amount of tax penalties and interest due. The taxpayer shall have ten days after receipt of such notice within which to make such payment. If the taxpayer fails to make payment within such ten day period, the city collector shall proceed to collect the amount due.

(Bill No. 6799, § 6-128, 1-22-2002)

State Law reference— For state law as to erroneous computation of state business and occupation tax returns, see W. Va. Code § 11-10-6.

Secs. 110-89—110-110. - Reserved.

DIVISION 4. - TAX ASSESSMENTS

Sec. 110-111. - Limitation on assessments.

The amount of tax, interest and penalties imposed by this article shall be assessed within three years after the due date of the fourth quarter return for the year in which such tax arose; provided, that in the case of a false or fraudulent return filed with the intent to evade the tax or in case no return is filed, the assessment may be made at any time.

(Bill No. 6799, § 6-138, 1-22-2002)

State Law reference— For state law as to limitations on assessments, see W. Va. Code § 11-10-15.

Sec. 110-112. - Assessment of tax when insufficiently returned.

- (a) If the city collector believes that the tax imposed by this article has been insufficiently returned by a taxpayer, because the taxpayer has failed to properly remit the tax, has failed to make a return or has made a return which is incomplete, deficient or otherwise erroneous, he may proceed to investigate and determine or estimate the tax liability of the taxpayer and make an assessment

therefore. Assessments shall be served upon the taxpayer either personally or by certified mail. If any certified mail is refused or not claimed, the city collector may make service by first class mail and prepaid postage.

- (1) *Jeopardy assessments.* If the city collector believes that the collection of any tax which he is required to administer will be jeopardized by delay, he shall thereupon make an assessment of the tax, noting that fact upon the assessment. The amount assessed will be immediately due and payable. Unless the taxpayer against whom a jeopardy assessment is made petitions for reassessment, within 20 days after service of notice of jeopardy assessment, such assessment becomes final. Such petition for reassessment must be accompanied by such securities as the city collector deems necessary.
- (2) *Amended assessment.* The city collector may, at any time before the assessment becomes final, amend, in whole or in part, any assessment whenever he ascertains that such assessment is improper or incomplete in any material respect.
- (3) *Supplemental assessment.* The city collector may at any time within the period prescribed for assessment, make a supplemental assessment whenever he ascertains that any assessment is incorrect in any material respect.

(Bill No. 6799, § 6-129, 1-22-2002)

State Law reference— For corresponding provisions of state business and occupation tax law, see W. Va. Code § 11-13-7.

Sec. 110-113. - Notices of assessment; petition for reassessment.

The city collector shall give the taxpayer written notice of any assessment made pursuant to this article. Unless the taxpayer to whom the notice of assessment is given shall within thirty 30 days (except if jeopardy assessment) after service thereof, either personally or by certified mail, file with the city collector a petition for reassessment in writing verified under oath by the taxpayer or his duly authorized agent having knowledge of the facts, setting forth with particularity the items of the assessment objected to, together with the reasons for the objections; the assessment shall become final and not subject to administrative or judicial review. The amount of an assessment shall be due and payable on the day following the date upon which the assessment becomes final.

(Bill No. 6799, § 6-130, 1-22-2002)

State Law reference— For corresponding provisions of state business and occupation tax law, see W. Va. Code § 11-13-7.

Sec. 110-114. - Hearing procedure; administrative decision.

- (a) When a petition for reassessment or refund or credit as provided for in sections 10-113 and 110-33 is filed within the time prescribed for such filing, the city collector shall assign a time and a place for a hearing thereon and shall notify the petitioner of such hearing by written notice at least twenty days in advance thereof. Such hearing shall be held within 90 days from the date of filing the petition, unless continued by agreement of the parties or by the city collector for sufficient cause.
- (b) The hearing shall be informal and shall be conducted in an impartial manner by the city collector or a hearing examiner designated by the city collector. The burden of proof shall be upon the taxpayer to show that the assessment is incorrect and contrary to law, in whole or in part.

- (c) After such hearing, the city collector shall, within a reasonable time, give notice in writing of his decision.

(Bill No. 6799, § 6-131, 1-22-2002)

State Law reference— For corresponding provisions of state business and occupation tax law, see W. Va. Code § 11-13-7.

Sec. 110-115. - Appeals to circuit court.

- (a) An appeal may be taken by the taxpayer to the Circuit Court of Kanawha County within thirty 30 days after service of the city collector's decision.
- (b) The appeal shall be taken by the filing of a petition and notice, which petition and notice shall be serviced upon or accepted by the city collector as an original notice. When the petition and notice is so served it shall, with the return or acceptance thereon, be filed in the office of the clerk of the circuit court and docketed as other cases, with the taxpayer as plaintiff and the city collector as defendant. The filing of the appeal shall not stay the collection of the tax. The collection of the tax shall be stayed if the plaintiff shall file with such clerk a bond for the use of the defendant, with sureties approved by the clerk, the penalty of the bond to be not less than the total amount of the tax, interest and penalties (to such date) appealed from, and conditioned that the plaintiff shall perform the orders of the court; provided, that the judge of the circuit court may stay the collection of the tax without the requirement of a bond, upon a proper showing by the taxpayer that the properties of the taxpayer are sufficient to secure performance of the court's orders or that the ends of justice will be served thereby.
- (c) The court shall hear the appeal and determine anew all questions submitted to it on appeal from the determination of the city collector. In such appeal a certified copy of the city collector's assessment shall be admissible and shall constitute prima facie evidence of the tax due under the provisions of this article. The court shall render its decree thereon, and a certified copy of the decree shall be filed by the clerk of the court with the city collector, who shall then correct the assessment in accordance with such decree.
- (d) Unless an appeal is taken pursuant to this section within thirty 30 days after service of the administrative decision, the city collector's decision shall become final and conclusive and not subject to administrative or judicial review. The amount, if any, due the city under such decision shall be due and payable on the day following the date upon which such decision becomes final.

(Bill No. 6799, § 6-132, 1-22-2002)

Editor's note— This section appears to have been enacted by the city council as declaratory of the provisions of W. Va. Code § 11-10-10, as such provisions would be applicable in the case of an appeal by a city taxpayer from an assessment by the city collector under this article; and it is not to be assumed that the council purported to confer jurisdiction on the circuit court or to dictate to the judge or clerk of such court as to their respective powers and duties.

Sec. 110-116. - Ten-year limitations on collection.

Every proceeding instituted by the city collector for the collection of taxes shall be commenced within ten years after the date such assessment became final. If an assessment is not issued, every proceeding instituted by the city collector for the collection of taxes shall be commenced within ten

years after taxpayer filed the annual return (or the latest periodical return, if no annual return is required). The limitations of this section can be extended, by written agreement at two years increments.

(Bill No. 6799, § 6-138.1, 1-22-2002)

Secs. 110-117—110-140. - Reserved.

DIVISION 5. - TAX COLLECTION

Sec. 110-141. - Methods of collection.

The city collector shall collect the taxes, interest and penalties imposed by this article. In addition to all other remedies available for the collection of debts due the city, the city collector may proceed by foreclosure of the lien provided in section 110-142 or by distraint and sale under section 110-143.

(Bill No. 6799, § 6-133, 1-22-2002)

State Law reference— For corresponding provisions of state business and occupation tax law, see W. Va. Code § 11-10-11.

Sec. 110-142. - Tax constitutes debt: lien created; enforcement of lien.

- (a) Any tax, penalties or interest due and payable under this article shall be a debt due the city. It shall be a personal obligation of the taxpayer and shall be a lien upon the real and personal property of the taxpayer. This lien shall have priority over all other liens except those due the state and the United States of America.
- (b) The lien created by this section shall continue until the liability for the tax, interest and penalties is satisfied or becomes unenforceable by reason of lapse of time. The city collector shall issue his certificate of release of any lien imposed pursuant to this section upon finding that the liability for the amount assessed has been fully satisfied or has become legally unenforceable.
- (c) The lien created by this section shall be subject to the restrictions and conditions embodied in W. Va. Code ch. 38, art. 10C.

(Bill No. 6799, § 6-134, 1-22-2002)

State Law reference— For corresponding provisions of state business and occupation tax law, see W. Va. Code § 11-10-12.

Sec. 110-143. - Distraint.

If the tax administered under this article is required to be paid at the time a return is filed and if any portion of such tax is not so paid, or if a proper assessment of tax is made by the city collector and such assessment has become final and is not subject to administrative or judicial review, the city collector may distraint upon and sell the real and personal property including intangibles represented by negotiable evidence of indebtedness of the taxpayer, for the payment of the amount of all taxes, penalty and interest accrued and unpaid under this article. The warrant created by this section may be served by a police officer of the city or by the sheriff of the county in which the delinquent taxpayer resides or his property is situate.

(Bill No. 6799, § 6-135, 1-22-2002)

State Law reference— For state law as to collection of business and occupation tax by distraint, see W. Va. Code § 11-10-13.

Sec. 110-144. - Injunction.

- (a) If the failure of any taxpayer to comply with the provisions of this article shall have continued 60 days, the city collector may proceed to obtain an injunction restraining the taxpayer from doing business in the city until he fully complies with the provisions of this article. In any proceeding under the section, upon judgment or decree for the plaintiff, he shall be awarded his costs.

(Bill No. 6799, § 6-136, 1-22-2002)

State Law reference— For state law as to injunctions, see W. Va. Code § 11-10-11(h).

Sec. 110-145. - Interest and penalties.

- (a) The tax imposed by this article, if not paid when due, shall bear interest at the rate of at least eight percent per annum from the due date of the return until paid. The city collector may charge an interest rate equal to the adjusted rate charged by commercial banks to large business, in the manner described in W. Va. Code § 11-10-17a.
- (b) If any taxpayer fails to make the return or any quarterly installment required by this article, or make his return but fails to remit, in whole or in part, the proper amount of tax, there shall be added to the amount of tax unpaid, from the date such tax should have been paid, a penalty in the amount of five percent of the tax for the first month, or fraction thereof, of delinquency, and one percent of the tax for each succeeding month, or fraction thereof of delinquency provided, that if such failure is due to reasonable cause, the city collector may waive, with final approval from the city manager, in whole or in part, these penalties. Additionally, if the failure to pay is due to fraud or intent to evade any such tax there shall be added an additional penalty of 25 percent of the tax owed, exclusive of penalties.
- (c) Interest and penalties may be collected in the same manner as the tax imposed by this article.

(Bill No. 6799, § 6-139, 1-22-2002)

State Law reference— For corresponding provisions of state business and occupation tax law, see W. Va. Code § 11-13-7.

Sec. 110-146. - Payment when person sell[s] out or quits business; liability of successor, liens.

- (a) If any person subject to any tax administered under this article sells out his or its business or stock of goods, or ceases doing business, any tax, penalties and interest imposed by this article shall become due and payable immediately, and such person shall, within 30 days after selling out his or its business or stock of goods or ceasing to do business, make a final return and pay any tax that may be due. The unpaid amount of any such tax shall be a lien upon the property of such person.
- (b) The successor of any person selling his/her business or stock of goods shall withhold so much of the purchase money as will satisfy any tax, penalties and interest which may be due until the former owner shall produce a certificate from the city collector evidencing the payment thereof. If the purchaser of a business or stock of goods shall fail to withhold purchase money as provided above, and if any such tax, penalties and interest remain unpaid after the expiration of the 30-day period allowed for payment thereof, the purchaser shall be personally liable for the payment of any such tax, penalties; and the same shall be recoverable by the city collector.

(Bill No. 6799, § 6-140, 1-22-2002)

State Law reference— For corresponding provisions of state business and occupation tax law, see W. Va. Code § 11-10-11(f).

Sec. 110-147. - Settlement of contracts made with city.

All officers, employees and agents making contracts on behalf of the city shall withhold payment in the final settlement of such contracts until the receipt of a certificate from the city collector that all taxes levied or assessed under this article against the contractor with respect to such contracts have been paid.

(Bill No. 6799, § 6-141, 1-22-2002)

State Law reference— For state law basis of this section and penalty for violation, see W. Va. Code § 11-10-11(d).

Sec. 110-148. - Final settlement with contractors; user personally liable.

- (a) Any person contracting with a person engaged in a business or service taxed under this article shall withhold payment, in sufficient amount to cover taxes assessed by this article, in the final settlement of such contracts until the receipt of a certificate from the city collector to the effect that all taxes levied and accrued under this article against the contractor have been paid.
- (b) If any person shall fail to withhold as provided herein, he shall be personally liable for the payment of all such taxes, and the same shall be recoverable by the city collector by appropriate legal proceedings.

(Bill No. 6799, § 6-142, 1-22-2002)

State Law reference— For corresponding provisions of state business and occupational tax law, see W. Va. Code § 11-10-11(b).

Sec. 110-149. - Limited effect of city collector's certificate.

The certificates of the city collector provided for in sections 110-146 to 110-148 inclusive, shall not bar subsequent investigations, examination, audits, assessments, and refunds with respect to the taxpayer.

(Bill No. 6799, § 6-143, 1-22-2002)


Secs. 110-150—110-180. - Reserved.



CITY OF CHARLESTON
P.O. Box 2749
CHARLESTON, WEST VIRGINIA 25330

I, the undersigned City Clerk of Charleston, do hereby certify that the foregoing is a true, correct and complete copy of Bill No. 7229, Committee Substitute, enacted by the City Council of the City of Charleston on October 2, 2006.

Witness the signature of the undersigned City Clerk of the City of Charleston, West Virginia, and the seal of the City, this 3rd day of October, 2006.


James M. Reishman
City Clerk

Seal

1
2 Bill No.: 7229 Committee Substitute

3
4 Introduced in Council

Adopted by Council

5
6 September 5, 2006

~~October 2, 2006~~

7
8 Introduced by

Referred to:

9
10 Harry Deitzler and Linda Nielsen

Council Committee on
Cable Television

11
12
13
14 Bill No. 7229 -- A Bill (a) approving the renewal of a cable television franchise now
15 held by Cebridge Acquisition, LLC ("Cebridge").

16
17 **WHEREAS**, Cebridge is the present holder of a non exclusive cable television
18 franchise that was originally granted by the City of Charleston, WV ("City"), as set forth
19 in Bill No. 4370, Committee substitute dated November 7, 1988, and renewed by Bill No.
20 6610 as Amended and adopted by Council on October 4, 1999 (the "Franchise") and
21 transferred to Cebridge by Bill No. 7214 as Amended and adopted by Council on July 3,
22 2006 (the "Transfer"); and

23
24 **WHEREAS**, the Franchise is presently scheduled to expire on October 3, 2006;
25 and

26
27 **WHEREAS**, Cebridge has submitted its application for renewal of the Franchise
28 in the form required by West Virginia Code §24D-1-11 ("Application"); and

29
30 **WHEREAS**, the City has reviewed the Application and held public hearings on
31 the proposed renewal of the Franchise ("Renewal"); and

32
33 **WHEREAS**, the City has followed all required procedures to consider and act
34 upon the Renewal, and has considered the comments of all interested parties at a hearing
35 held on September 27, 2006 as well as a hearing on this ordinance on October 2, 2006
36 (collectively, the "Public Hearings"); and

37
38 **WHEREAS**, the Public Hearings did not produce substantial public opposition to
39 the Renewal; and

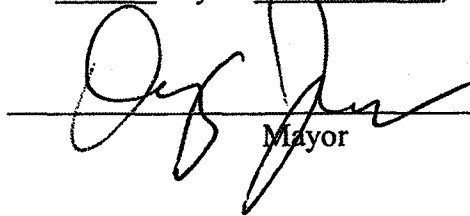
40
41 **WHEREAS**, the City believes it is in the interest of the community to approve
42 the Renewal of the Franchise, and to approve the terms of a new Franchise Agreement
43 ("Agreement") between the City and Cebridge.

44
45
46

47 **NOW THEREFORE BE IT ORDAINED;**
48

49 That with respect to and in accordance with the provisions of West Virginia Code
50 §24D-1-11, and Bill No. 4370, Committee Substitute dated November 7, 1998 and Bill
51 No. 6610 as Amended and adopted by Council on October 4, 1999, (the "Ordinances"),
52 City hereby approves the renewal of the Franchise heretofore transferred to Cebridge in
53 accordance with Bill No. 7214 as Amended and adopted by Council on July 3, 2006 for a
54 period of five (5) years, with said Franchise now set to expire on October 3, 2011, upon
55 the terms of the Agreement attached hereto and incorporated herein by reference.
56

57
58 **PASSED, ADOPTED AND APPROVED** this 2nd day of October, 2006.
59

60 
61 _____
62 Mayor
63
64

65 **ATTEST:**

66
67 
68 _____
69 CLERK
70

FRANCHISE AGREEMENT

This Franchise Agreement is between the CITY OF CHARLESTON, WEST VIRGINIA, a Municipal Corporation (hereinafter referred to as "CITY" or "FRANCHISE AUTHORITY") and CEBRIDGE ACQUISITION, LLC, doing business as SUDDENLINK COMMUNICATIONS, (hereinafter referred to as "SUDDENLINK" or "FRANCHISEE")

The City Council finds as follows:

A. Suddenlink filed an Application For Renewal Of A Cable Franchise ("Application") to construct, operate and repair a Cable System in, over, along and under City roads and appropriate Rights-of-Way in the City of Charleston for the purpose of providing Cable Service.

B. The City has conducted hearings to consider Suddenlink's compliance with the terms of the existing franchise and with applicable law; the quality of Suddenlink's service in light of community needs; the financial, technical, and legal qualifications of Suddenlink; and to determine whether Suddenlink's plans for constructing and operating its System are adequate to meet the future cable-related community needs and interests.

C. The City has relied on Suddenlink's written representations and has considered all information Suddenlink has presented to it.

D. The City Council, having considered the interests proposed and advanced, has found that the renewal of the non-exclusive Franchise requested, subject to conditions, is in the public interest.

E. Suddenlink is willing to accept the conditions on the Franchise renewal; and

F. The Charleston City Council held a public hearing on the Application on the 27th day of September, 2006, after providing legal notice of the Application and of the hearing, as required by law.

Upon the adoption of a Cable Ordinance by the City Council, the City hereby grants a cable television franchise to Suddenlink as follows:

SECTION 1
Definition of Terms

- 1. Terms.** For the purpose of this franchise the following terms, phrases, words and their derivations shall have the meaning ascribed to them in the Cable Communications Policy Act of 1984, (the "Cable Act"), The Cable Television Systems Act, *West Virginia Code §24D-1-1 et seq.*, ("West Virginia Cable Law"), and relevant City of Charleston ordinances (collectively "Applicable Law"), all as amended from time to time, unless otherwise defined herein. When not inconsistent with the context, words used in the present tense include the future, words in the plural number include the singular number, and words in the singular number include the plural number. The word "shall" is mandatory and "may" is permissive. Words not defined shall be given their common and ordinary meaning.
- 1.1. **Access, PEG Access, or PEG Use.** The availability of the Cable System for Public, Education or Government ("PEG") use by various agencies, institutions, organizations, groups, and individuals, including the City and its Designated Access Providers, to acquire, create, and distribute video and non-video communications not under Franchisee's editorial control, including, but not limited to:
- 1.1.1. **Public Access or Public Use** means Access where organizations, groups, or individual members of the general public, on a non-discriminatory basis, are the designated programmers or users having editorial control over their communications;
- 1.1.2. **Education Access or Education Use** means Access where Schools are the designated programmers or users having editorial control over their communications;
- 1.1.3. **Government Access or Government Use** means Access where government institutions or their designees are the designated programmers or users having editorial control over their communications;
- 1.2. **Basic Service.** Any service tier which includes the retransmission of local television broadcast signals.
- 1.3. **Cable Ordinance.** Bill Number 7229 adopted October 2, 2006 approving the renewal of a cable television franchise now held by Cebridge Acquisition, LLC.
- 1.4. **Cable Service.** (A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) the subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.

- 1.5. Cable System. Shall be as defined in the West Virginia Cable Law and, as used herein specifically refers to the Franchisee's Cable System. A reference to a Cable System includes pedestals, enclosures (such as equipment cabinets), amplifiers, power guards, nodes, cables, fiber optics and other equipment necessary to operate the Cable System.
- 1.6. Channel. A portion of the electromagnetic frequency spectrum which is used in a Cable System and which is capable of delivering a standard NTSC broadcast video programming service whether in an analog or digital format. The definition does not restrict the use of any Channel to the transmission of analog television signals.
- 1.7. Designated Access Provider. A non-commercial entity or entities designated by the City to manage some or all of the PEG Channels, facilities and equipment.
- 1.8. Franchise Area. The Franchise Area shall include all areas within the City Limits as currently exist, and as may be extended during the period of the Franchise.
- 1.9. Franchise. The nonexclusive rights granted pursuant to this Agreement, and any amendments, exhibits, or appendices hereto, to construct, operate, and maintain a Cable System along the public Right-of-Way within the Franchise Area.
- 1.10. Franchisee. Cebridge Acquisition, LLC, doing business as Suddenlink Communications.
- 1.11. Gross Revenues. Any and all revenues derived directly or indirectly, now or in the future, by the Franchisee, its affiliates, subsidiaries, parent company, and any person in which the Franchisee has an interest, from the operation of the Cable System to provide Cable Service; provided, however, that gross revenues shall not include any taxes, fees or assessments of general applicability collected by Franchisee from Subscribers for pass-through to a government agency.
- 1.12. Person. An individual, partnership, association, organization, corporation, trust or government entity.
- 1.13. Standard Drop. An aerial connection extending no more than 150 feet from the potential Subscriber's demarcation point to the point nearest the property line on the public Right-of-Way from which Cable Service can be provided to that Subscriber most economically.
- 1.14. PEG Channel. Any capacity on a Cable System set aside by a Franchisee for PEG Use, including by way of example and not limitation, a digital PEG Channel or an analog PEG Channel.
- 1.15. School. Any accredited public or private, non-profit primary and secondary schools and colleges (which term includes all accredited post-secondary institutions, including by way of example and not limitation, community colleges, technical colleges and universities).
- 1.16. Subscriber. Any Person lawfully receiving Cable Service from the Franchisee.

- 1.17. Subscriber Network. Fibers, coaxial cables and the electronic devices required to activate the same that are used primarily in the transmission of Cable Service to residential Subscribers.
- 1.18. Transfer. Shall Mean any transaction in which:
- 1.18.1 The Cable System is sold or assigned;
 - 1.18.2 There is any change, acquisition, or transfer of control of the Franchisee or its direct or indirect parents, whether by merger, consolidation, sale of assets or ownership interests, or by any other means. A Transfer shall be deemed to have occurred whenever there is a change, acquisition or conveyance of control of a general partner, of more than a twenty percent (20%) ownership in the Franchisee or its direct or indirect parents by any entity, or a group of entities acting in concert. However, a Transfer also occurs whenever there is a change in actual working control, in whatever manner exercised, over the affairs of the Franchisee or its direct or indirect parents.
 - 1.18.3 The rights and/or obligations held by the Franchisee are transferred, sold, assigned, or leased, in whole or in part, directly or indirectly to another party.

SECTION 2

Grant of Franchise; Limits and Reservations.

2.1 Grant. A Cable System Franchise is hereby granted to Franchisee, subject to the conditions set forth in this Agreement and all Applicable Laws. This Franchise grants the right, subject to conditions, to construct, operate and repair a Cable System in, over, along and under City Rights-of-Way within the City of Charleston for the purpose of providing Cable Service, and for providing an institutional network ("I NET") and other facilities or services for PEG Use of the Cable System, commencing on the effective date of the Franchise through and including October 3, 2011, unless terminated prior to that date in accordance with the Franchise or Applicable Law.

2.2 Term. The Franchise and the rights, privileges and authority hereby granted shall be for an initial term of five (5) years, commencing on the Effective Date of this Franchise as set forth in subsection 15.4.

2.3 Relation to Other Provisions of Law.

2.3.1. The Franchise issued by the City is subject to, and Franchisee must exercise all rights granted to it in accordance with Applicable Law. This Franchise does not confer rights upon the Franchisee other than as expressly provided herein, or as expressly provided under other Applicable Law. No privilege or power of eminent domain is bestowed by this grant. All rights and powers of the City now existing or hereafter obtained are reserved except as expressly provided to the

contrary in the Franchise. Nothing passes by implication under this Franchise. Subject to the foregoing, Franchisee shall provide the Cable Service required hereunder throughout the Franchise Term and any holdover term, and shall make any Cable Service it provides over its Cable System available to all entities in its Franchise Area, subject to the line extension provisions herein.

- 2.3.2. This Franchise and all rights granted under the Franchise are subject to the City's police and other powers. However, once the Franchise grant is effective, this Franchise is a contract and except as to those changes which are the result of the City's exercise of its police and other powers, neither party may take any unilateral action which materially changes the explicit mutual promises in this contract.
- 2.3.3. The Franchise shall be interpreted to convey limited rights and interests only as to those City Rights-of-Way in which the City has an actual interest and only to the extent and for the purposes set out in the Franchise. The grant of the Franchise is not a warranty of title or interest in any Right-of-Way; it does not provide the Franchisee any interest in any particular location within the Rights-of-Way. The issuance of the Franchise does not deprive the City of any powers, rights or privileges it now has or may later acquire in the future to use, perform work on, construct, operate or repair facilities or systems in, or regulate or control the use of the Rights-of-Way.
- 2.3.4. The Franchise issued and the franchise fee paid hereunder are not in lieu of any other required permit, authorization, fee, charge or tax. Without limiting the foregoing, the City, among other things, does not waive the requirements of, or the Franchisee's duty to obtain, all applicable permits, and to comply with the conditions thereof; to comply with zoning laws; or to comply with codes, ordinances and regulations governing the construction of the Cable System.

2.4 Interpretation and Conflicts.

- 2.4.1 In the event of a conflict between the Cable Ordinance and this Agreement as of its effective date, the Cable Ordinance shall control except where expressly provided otherwise in the Agreement.
- 2.4.2 The provisions of this Franchise shall be liberally construed in favor of the public interest in order to effectuate its purposes.
- 2.4.3 This Franchise is only for the provision of Cable Service. It shall not act as a bar or in any respect prevent imposition of additional or different conditions, including additional fees related to the provision of, or the use or occupancy of the Rights-of-Way to provide, non-cable services. Nothing in this section is intended to expand or contract the City's rights to regulate non-cable services.

- 2.5 Affiliates Must Comply.** Any Affiliate or joint venture or partner of the Franchisee involved in the management or operation of the Cable System in the City that would constitute a cable operator of the Cable System is subject to the

limitations of, and shall comply with the terms and conditions of the Franchise. The Franchisee shall be fully liable for any act or omission of an Affiliate that controls the Franchisee or is responsible in any manner for the management of the Cable System that results in a breach of this Franchise or a violation of the Cable Ordinance, as if the act or omission was the Franchisee's act or omission.

2.6 Relation to Prior Franchise. As of the effective date of this Franchise, the franchise previously held by the Franchisee is superseded and of no further force and effect. Subject to any applicable statute of limitations, nothing in this paragraph shall be deemed to release the Franchisee from any liability arising under the prior franchise during the time it was in effect. Franchisee shall provide proof satisfactory to the City that it will continue to provide the same or greater indemnity required under the prior franchise, and that it continues to maintain adequate insurance for injuries to persons or property that may have occurred during the prior franchise term, subject to any limitations to which the City may have agreed in settlement of claims arising under the prior franchise.

2.7 Validity. Both parties waive any claim or defense that any provision of this Franchise, or any provision of the Cable Ordinance is unenforceable or otherwise invalid or void. Neither party waives the right to challenge the validity of any other Applicable Law.

2.8 Effect of Franchise Acceptance. By accepting the Franchise, the Franchisee:

2.8.1 Acknowledges and accepts the City's legal right to issue and enforce the Franchise;

2.8.2 Accepts and agrees to comply with each and every provision of this Franchise; and

2.8.3 Agrees that the Franchise was granted pursuant to processes and procedures consistent with Applicable Law, and that it will not raise any claim to the contrary.

2.9 Franchisee Bears Its Own Costs. Unless otherwise expressly provided in this Franchise, all acts that the Franchisee is required to perform under this Franchise or the Cable Ordinance must be performed at its own expense.

2.10 No Waiver.

2.10.1 No course of dealing between a Franchisee and the City, or any delay on the part of the City or Franchisee in exercising any rights shall operate as a waiver of any such rights, except to the extent expressly waived; *provided that*, nothing in this section is meant to alter any renewal protections afforded by 47 U.S.C. §546(d).

2.10.2 Waiver of a breach of this Franchise is not a waiver of any other breach, whether similar or different from that waived. Neither the granting of the Franchise nor any provision herein shall constitute a waiver or bar to the exercise of any

governmental right or power of the City, including without limitation the right of eminent domain.

2.11 No Recourse. Without limiting such immunities as the City or other Persons may have under Applicable Law, and to the maximum extent permitted by State law, Franchisee will have no monetary recourse whatsoever against the City or its officials, boards, commissions, agents or employees for any loss, costs, expense or damage arising out the construction, operation or repair of its Cable System, or the activities of the City or any entity authorized by the City to use Rights-of-Way or other public property.

2.12 Severability. In the event that a court or agency or legislature of competent jurisdiction acts or declares that any nonmaterial provision of this Franchise is unenforceable according to its terms, or otherwise void, said provision shall be considered a separate, distinct, and independent part of this Franchise, and such holding shall not affect the validity and enforceability of all other provisions hereof. In the event that a court or agency or legislature of competent and controlling jurisdiction acts so that any material provision of this Agreement is unenforceable according to its terms, or is otherwise void, the parties agree to immediately enter into negotiations in good faith to restore the relative burdens and benefits of this Franchise, consistent with Applicable Law. If the parties are unable to agree to a modification of this Franchise within 60 days, either party may with 90 days prior notice, terminate or shorten the Franchise term; or resort to litigation to seek any available equitable relief; or do both. However, if a party does seek equitable relief before the effective date of termination or shortening, the termination or shortening will be stayed pending the resolution of the judicial proceedings. Each party agrees to participate in up to sixteen hours of negotiation during the 60-day period. Notwithstanding the foregoing, if a party believes a provision is not material, it must so notify the other party within 14 days of a request by such other party that it enter into negotiations, or else the materiality claim is waived. The obligation to negotiate is not tolled, and the parties must discharge their negotiation responsibility notwithstanding the dispute as to materiality. The remedies provided for herein do not prevent a party from contending that a particular provision is enforceable, or foreclose any remedies if a provision is enforceable.

2.13 Effect of Change in Law. Subject to Section 2.13, in the event that State or Federal laws, rules, or regulations preempt a provision or limit the enforceability of a provision of this Franchise, then the provision shall be read to be preempted to the extent and for the time, but only to the extent and for the time, that such laws, rules or regulations validly acted to preempt such provision. In the event such State or Federal law, rule, or regulation is subsequently repealed, rescinded, amended, or otherwise changed, so that the provision hereof that had been preempted is no longer preempted, such provision shall thereupon return to full force and effect and shall thereafter be binding on the parties hereto, without the requirement of further action on the part of the City.

SECTION 3

Transfer

3.1 Procedures for Transfer. Franchisee agrees that the rights granted to it by the City are personal in nature and held in trust. No Transfer may occur without the prior consent of the City, which shall not be unreasonably withheld. An application for a Transfer, containing all information required under Applicable Law, must be filed before a request for a Transfer will be considered by the City and such application will be considered in accordance with the provisions of Applicable Law.

SECTION 4

Indemnification and Insurance

4.1. Indemnification. Without limiting and expressly preserving all immunities that the City has under Applicable Law, and to the maximum extent permitted by Applicable Law, the Franchisee shall, by acceptance of the Franchise granted herein, hold harmless, indemnify and defend the City, its officers, boards, commissions, agents, and employees for all claims for injury to any Person or property caused by the negligence of Franchisee, or resulting from any condition or act of omission or commission or error in judgment of Franchisee, in the construction or operation of the Cable System and in the event of a determination of liability shall indemnify, defend and hold the City, its officers, boards, commissions, agents, and employees harmless from any and all liabilities, claims, demands, or judgments growing out of any injury to any Person or property as a result of the negligence of Franchisee, or the result of any condition or act of omission or commission or error in judgment of Franchisee, arising out of the construction, repair, extension, maintenance, operation or removal of its wires, poles or other equipment of any kind or character used in connection with the operation of the Cable System; provided, that the City shall give the Franchisee written notice of Franchisee's obligation to indemnify and defend the City within ninety (90) days of receipt of a claim or action pursuant to this section. The City's failure to provide such notice, however, shall not nullify the Franchisee's obligation to indemnify and defend the City. In the event any such claim arises, the City shall tender the defense thereof to the Franchisee, the Franchisee shall be obligated pursuant to the terms herein to accept said tender, and the Franchisee shall have the right to defend, settle or compromise any claims arising hereunder, at its own expense. If the City determines in good faith that its interests cannot be represented by the Franchisee, the Franchisee shall be excused from any non-monetary obligation to represent the City; provided, however, the decision of the City to obtain its own representation shall not serve to nullify the Franchisee's monetary obligation to indemnify the City for the cost of its defense and any amounts for which the City is found liable. Notwithstanding the foregoing, the Franchisee shall not be obligated to indemnify the City for any damages, liability or claims resulting from the City's use of the Cable System, including any PEG channels. The indemnity provided for herein shall be deemed in addition to and in no way a limitation upon the City's and its agents' right of common law indemnification from Franchisee.

4.2 Insurance.

A. The Franchisee shall maintain throughout the term of the Franchise insurance in amounts at least as follows:

Workers' Compensation	Statutory Limits
Commercial General Liability	\$1,000,000 per occurrence, Combined Single Liability (C.S.L.) \$2,000,000 General Aggregate
Auto Liability including coverage on all owned, non-owned hired autos Umbrella Liability	\$1,000,000 per occurrence C.S.L.
Umbrella Liability	\$1,000,000 per occurrence C.S.L.

B. The City shall be added as an additional insured to the above Commercial General Liability, Auto Liability and Umbrella Liability insurance coverage.

C. The Franchisee shall furnish the City with current certificates of insurance evidencing such coverage upon request.

SECTION 5 **Service Obligations**

5.1 No Discrimination. The Franchisee shall not deny service, deny access, or otherwise discriminate against Subscribers, channel users, or general citizens on the basis of race, color, religion, national origin, age or sex.

5.2.1 Privacy. The Franchisee shall fully comply with the privacy rights of Subscribers as contained in Cable Act Section 631 (47 U.S.C. § 551).

5.3 No Limitation. Nothing herein prevents the City from adopting additional non-discrimination and privacy requirements by ordinance, resolution or regulation, which provisions, if otherwise permitted under Applicable Law, shall apply to Franchisee.

SECTION 6 **Service Availability**

6.1 Provision of Service. Within the Franchise Area, Franchisee shall provide Cable Service upon request for no more than the prevailing installation charge, but without charging for line extension where there is either a minimum density of twenty-five (25) residential units per aerial or underground mile or where thirteen (13) locations per mile contract to subscribe to Cable Service for one year. Where these standards are not satisfied, service will be extended upon request for no more than the then-prevailing installation charge if the Person or Persons, other than those entitled to a free drop, requesting service contract to pay a pro rata share of the cost of extending the plant to the point nearest the potential Subscriber's property line on the public Right-of-Way from which Cable Service can be provided most economically to that potential Subscriber. For new subdivisions, the Franchisee shall extend service at no charge to the developer if the planned density exceeds the minimum levels, or for a pro rata share of costs where it does not; provided that where construction will be underground, this sentence will not apply unless the developer provides reasonable advance notice so that the Franchisee can participate in joint trenching.

6.2 Economic Redlining. Franchisee shall extend its Cable System to low income areas at least as quickly as it is extended to higher income areas.

6.3 Drops; Prevailing Charges. In addition, except as lawful rate orders may otherwise provide, and except with respect to those locations which are entitled to free drops:

6.3.1 The "then-prevailing installation charge" is the lowest lawful charge that applies at any given time to a particular class of users. If Applicable Law permits, nothing in this Franchise prohibits Franchisee from establishing separate charges for separate classes of drops, such as, for example, underground and aerial drops.

6.3.2 Where the drop to a Subscriber is not a Standard Drop, in addition to the then-prevailing installation charge for Standard Drops, Franchisee may charge the Subscriber the difference between Franchisee's cost of installing a Standard Drop and the actual additional cost of installing a drop from the nearest tap, or if closer, the point to which Franchisee could be required to extend its Cable System.

6.4 Subscriber Option for Underground Drops. Where the Franchisee may locate a drop above ground, but a potential Subscriber requests that the cable drop be placed underground, the Franchisee shall locate the drop underground, but in addition to the then-prevailing installation charge may charge the Subscriber for the actual difference in cost of installing the underground drop, rather than an aerial drop. An existing Subscriber may require the Franchisee to relocate an existing aerial drop underground, and Franchisee may charge the requesting Subscriber for the cost of relocating the drop underground.

SECTION 7

Construction and Technical Standards

7.1 Compliance with Codes. Without limiting Section 2, Franchisee agrees that at all times it will satisfy the following, minimum conditions:

7.1.1 Minimum Conditions. The construction, operation, and repair of the Cable System will be in accord with all Applicable Law. At a minimum, Franchisee shall comply with construction procedures approved by the City; IEEE standards, the National Electric Code, the National Electrical Safety Code and any other applicable safety codes. The most stringent applicable code or standard will apply in the event of any conflict (except insofar as that standard, if followed, would result in a system that could not meet requirements of Federal, State or local law). Franchisee will employ reasonable care at all times, within the meaning of Applicable Law, and will install and maintain in use commonly accepted methods and/or devices to reduce the likelihood of damage, injury, or nuisance to the public. The construction, operation, and maintenance of the Cable System shall be performed by experienced and properly trained maintenance and construction personnel.

7.1.2 Compliance with Laws. Franchisee must install, locate, relocate and remove its Cable System in accordance with the Franchise and all other Applicable Laws, including City codes as the same may be amended from time to time. Franchisee shall not place or maintain its Cable System, including any poles or other structures, in Public Rights-of-Way or on private property except in strict accordance with the requirements of the Franchise and all other Applicable Laws.

7.1.3 All of Franchisee's plant and equipment, including but not limited to the antenna site, head-end and distribution system, towers, house connections, structures, poles, wire, cable, coaxial cable, fixtures and appurtenances shall be installed, located, erected, constructed, reconstructed, replaced, removed, repaired, maintained and operated in accordance with good engineering practices and performed by experienced maintenance and construction personnel.

7.2 Pole attachments and conduits. For I-NET and PEG Uses, pole and conduit space owned by Franchisee will be provided at no charge. Pole and conduit space will be provided to the City for all its other uses at the prevailing rate charged by regulated utilities for similar pole and conduit space in the City of Charleston, and under prevailing terms and conditions under which access is provided to similar pole or conduit space by such regulated utilities. In addition, whenever underground conduit is to be placed by the Franchisee, the Franchisee shall notify the City 90 days in advance and if requested, and if the same shall be in compliance with applicable purchasing laws, the Franchisee shall lay conduit for the City at the cost of the conduit, plus (where boring is involved), the incremental cost of the boring. Whenever underground conduit is to be placed by the City, the City will, if requested by the Franchisee, permit the Franchisee to lay conduit at the Franchisee's cost.

7.3 Notice of use. Franchisee will notify the City when it enters into an agreement for use of its poles and conduits.

7.4 Contractors and Subcontractors. Franchisee shall ensure that any contractor or subcontractor used for work on construction, operation, or repair of the Cable System is properly licensed under laws of the State and all applicable local ordinances. Each contractor or subcontractor shall have the same obligations with respect to its work as Franchisee would have under this Franchise and Applicable Law if the work were performed by Franchisee. The Franchisee shall be responsible for ensuring that the work of contractors and subcontractors is performed consistent with this Franchise and Applicable Law, shall be responsible for all acts or omissions of contractors or subcontractors, and shall be responsible for promptly correcting acts or omissions by any contractor or subcontractor. This section is not meant to alter the tort liability, if any, of Franchisee to third parties, or of any contractor or subcontractor to third parties or to Franchisee. Franchisee shall institute procedures adequate to ensure that the work performed by its contractors and subcontractors complies with the requirements of this Franchise and Applicable Law.

7.5 Safety. Franchisee shall at all times employ ordinary care and shall use commonly accepted methods and devices preventing failures and accidents which are likely to cause damage.

7.6 Network Technical Requirements. The Cable System must meet or exceed the technical standards set forth in 47 C.F.R. § 76.601 and any other applicable standards, as amended from time to time, *provided that*, nothing in this provision is intended to permit the City to exercise any authority that it is prohibited from exercising under applicable federal law.

7.7 Future Upgrades. It is Franchisee's responsibility to make such improvements to its Cable System as are necessary so that the Cable System performs as promised as Subscribers to services are added. In addition, it is Franchisee's responsibility to make such commercially practicable improvements to its Cable System throughout the Franchise term to ensure that Subscribers are able to obtain advanced Cable Service, and so that services can be added throughout the Franchise term. Commercial practicability may be determined by examining the improvements being made and the services being rolled out on similar cable systems.

7.8 Inspection and Testing. The City shall have the right to inspect the Cable System to ensure compliance with this Franchise, and applicable provisions of local, State and Federal law. The City (i) may require the Franchisee to perform tests based on the City's investigation of Cable System performance or on Subscriber complaints; and (ii) may require Franchisee to prepare a report to the City on the results of those tests, including a statement identifying any problems found and the actions taken to correct those problems. This provision is subject to any limitations on the City's authority under Applicable Law.

7.9 FCC-Mandated Testing. Franchisee shall, if requested, notify the City in advance of conducting any Proof-of-Performance test required by the FCC, so that the City may observe the testing. Upon request, the City shall be provided the test results

and any supporting documentation regarding the tests and testing equipment and procedures.

SECTION 8

Conditions on Street Occupancy

8.1 General Conditions. Without limiting Section 2, Franchisee agrees that at all times it shall, as a minimum condition of its use of the rights of way comply with the requirements of this Section 8 and that Franchisee shall have the right to utilize existing poles, conduits and other facilities whenever possible, and shall not construct or install any new, different, or additional poles, conduits, or other facilities on public property without obtaining all legally required permits of the City.

8.2 Underground Construction. The facilities of the Franchisee shall be installed underground in those service areas where existing telephone facilities of a provider other than the Franchisee or its affiliates and electric utility local distribution facilities are both underground at the time of system construction. In areas where either of such telephone or electric utility facilities are installed aerially at the time of system construction, the Franchisee may install its facilities aerially with the understanding that at such time as the existing aerial facilities are required to be placed underground by the City, the Franchisee shall likewise place its facilities underground. Nothing in this section shall preclude the Franchisee from receiving funds for relocation for which it is eligible.

8.3 Construction Codes and Permits. Franchisee shall obtain all legally required permits before commencing any work requiring a permit, including the opening or disturbance of any Street within the service area. The City shall cooperate with the Franchisee in granting any permits required, providing such grant and subsequent construction by the Franchisee shall not unduly interfere with the use of such Streets. The Franchisee shall adhere to all building and zoning codes currently or hereafter applicable to construction, operation or maintenance of the Cable System in the service area.

8.4 System Construction. All transmission lines, equipment and structures shall be so installed and located as to cause minimum interference with the rights and reasonable convenience of property owners and at all times shall be kept and maintained in a safe, adequate and substantial condition, and in good order and repair. The Franchisee shall, at all times, employ ordinary care and use commonly accepted methods and devices for preventing failures and accidents which are likely to cause damage, injuries, or nuisances to the public. Suitable barricades, flags, lights, flares or other devices shall be used at such times and places as are reasonably required for the safety of all members of the public. Any poles or other fixtures placed in any public way by the Franchisee shall be placed in such a manner as not to interfere with the usual travel on such public way.

8.5 Restoration of Public Ways. The Franchisee shall repair any disturbance or damage to public property or private property caused by Franchisee's construction, operation or repair of the Cable System promptly and in compliance with such standards and deadlines as may be specified by the City in writing. Franchisee agrees to compensate any entity whose person or property is damaged by Franchisee, or any contractor, subcontractor or agent of Franchisee in the course of the construction, operation or repair of the Cable System where the property is not fully restored by Franchisee to a condition as good or better than existed before the damage.

8.6 Removal in Emergency. In an emergency, or where the Cable System creates or is contributing to an imminent danger to public health, safety, or property, the City may remove, relay, or relocate any or all parts of the Cable System without prior notice; however, the City will make reasonable efforts to provide prior notice.

8.7 Tree Trimming. Franchisee or its designee shall have the authority to trim trees on public property at its own expense as may be necessary to protect its wires and facilities, subject to the supervision of the City, and any regulations that the City may adopt regarding the same.

8.8 Relocation for Government. Except as provided below, Franchisee will protect, support, temporarily disconnect, relocate, or remove any of its property at the time and in the manner required by the City or any other governmental entity for any governmental purpose.

8.8.1 Except in an emergency, the City will provide written notice describing where the work is to be performed at least thirty (30) days before the deadline for performing the work; Franchisee may seek an extension of the time to perform the work where it cannot be performed in a week even with the exercise of due diligence, and such request for an extension will not be unreasonably refused.

8.8.2 The Franchisee may abandon any property in Public Rights-of-Way that is in place upon written notice to the City and separate notice to the Public Works Director, unless the City determines, in the exercise of its reasonable discretion exercised within ninety (90) days of the date the required written notices are received, that the safety, appearance, functioning or use of Public Rights-of-Way and facilities in Public Rights-of-Way will be adversely affected. Abandonment shall be in a manner acceptable to the City Engineer.

8.9 Relocation for a Third Party.

8.9.1 If any removal, relaying, or relocation is required to accommodate the construction, operation, or repair of the facilities of another Person authorized to use Public Rights-of-Way (other than entities covered by Section 8.8 above), Franchisee will, after thirty (30) days' advance written notice, take action to effect the necessary changes requested by such Person.

8.9.2 Unless the matter is governed by a valid contract or Applicable Law, or unless the Franchisee's Cable System was improperly installed and if installed properly, the

removal, relocation or relaying would be unnecessary, the reasonable cost of removal, relaying, or relocation will be borne by such Person requesting the removal, relaying, or relocation.

8.9.3 The City may direct Franchisee to remove, relay, or relocate its facilities pending resolution of a dispute as to responsibility for costs upon posting of a bond by such Person requesting such removal, relaying or relocation in the amount of Franchisee's estimated costs.

8.9.4 Upon the request of a Person holding a valid permit, other than an entity covered by Section 8.8 above, Franchisee will temporarily raise or lower its wires to allow buildings or other objects to be moved. The requesting Person will pay for any expense associated with such temporary removal or raising or lowering of wires. Franchisee will have the authority to estimate the reasonable material and labor costs and require payment of the same in advance. The Franchisee will be given not less than thirty (30) days advance notice to arrange for such temporary wire changes.

8.10 Emergency Alert System. Franchisee must install and maintain an emergency alert system that can override audio and video on all Channels to provide an emergency alert to the City. The system must be designed and maintained so that local officials designated by the City can activate the system remotely without the assistance of Franchisee, using a telephone and secure password or by such other technical means as the City may approve. The system must be designed and maintained so that the designated officials, from a touch-tone telephone, can activate a pre-recorded text message, and at such officials' option, an accompanying live audio voice message for up to two minutes. The City and the Franchisee shall meet periodically to discuss operational procedures for use of the emergency alert system. As part of those discussions, the parties may agree on alternative capabilities and activation procedures for the emergency alert system. It should be integrated to the extent reasonably possible with other emergency alert systems the Franchisee is required to provide under Federal or State law.

SECTION 9

Service and Rates

9.1 Phone Service. The Franchisee shall maintain a local or toll free telephone number and a phone service operated and a local office in or near the service area such that complaints and requests for repairs or adjustments may be received at any time.

9.2 Notification of Service Procedures. The Franchisee shall furnish each Subscriber at the time service is installed, written instructions that clearly set forth information concerning the procedures for making inquiries or complaints, including the Franchisee's name, address and local or toll free telephone number. Franchisee shall give the City and subscribers at least thirty (30) days prior notice of any rate increases, channel lineup or other substantive service changes.

9.3 Rate Regulation. Franchisee's rates and charges are subject to regulation by the City, to the extent not prohibited by law. If and when exercising rate regulation, the City shall abide by the terms and conditions set forth by the state and FCC.

9.4 Continuity of Service. It is the right of each Subscriber in the Franchisee's Franchise Area to receive all available Cable Service from the Franchisee as long as the Subscriber's financial and other obligations to the Franchisee are satisfied.

9.4.1 The Franchisee shall ensure that all Subscribers receive continuous uninterrupted Cable Service. At the City's request, the Franchisee shall operate the Cable System for a temporary period (the "transition period") following the termination of its Franchise or any transfer as necessary to maintain Cable Service to Subscribers, and shall cooperate with the City to assure an orderly transition from it to another entity. The transition period shall be no longer than the reasonable period required to select another entity and to build a replacement Cable System, and shall not be longer than thirty-six (36) months, unless extended by the City for good cause. During the transition period, the Franchisee will continue to be obligated to comply with the terms and conditions of this Franchise and Applicable Laws and regulations, and will be deemed to have the necessary authorization required from the City to enable it to provide Cable Service.

9.4.2 If the Franchisee abandons its Cable System during the Franchise term or any transition period, or fails to operate its Cable System in accordance with the terms set forth in Section 9.4.3. below, the City, at its option, may operate the Cable System or designate another entity to operate the Cable System temporarily until the Franchisee agrees to restore and restores continuous Cable Service in compliance with the Franchise and the Cable Ordinance or until the Franchise is revoked and a new entity selected by the City is providing Cable Service.

9.4.3 The City shall be entitled to exercise its rights under Section 9.4.2. if the:

9.4.3.1. Franchisee fails to provide Cable Service in accordance with its Franchise over a substantial portion of the Franchise Area for ninety-six (96) consecutive hours, unless such failure is due to force majeure or the City authorizes a longer interruption of service; or

9.4.3.2 The Franchisee, for any period, willfully and without cause refuses to provide Cable Service in accordance with its Franchise over a substantial portion of the Franchise Area.

9.4.4 **Rights Upon Franchise Termination or Revocation.** If the City revokes the Franchise or the Franchise otherwise terminates, the City shall have the following rights, in addition to the rights specified in this Franchise or under Applicable Law:

9.4.4.1 The City may require the former Franchisee to remove its facilities and equipment at the former Franchisee's expense. If the former Franchisee fails to do so within a reasonable period of time, the City

may have the removal done at the former Franchisee's and/or surety's expense, subject to any right of abandonment that may be provided for under Applicable Law.

9.4.4.2 Subject to Applicable Law, the City, by City Council resolution, may acquire ownership or effect a Transfer of the Cable System at fair market value, or, if the Franchise terminates or is revoked for cause in accordance with the Cable Ordinance, at an equitable price. The terms "equitable price" and "fair market value" shall be interpreted in accordance with 47 U.S.C. § 547.

9.4.4.3 Section 9.4.4.2. does not apply to an abandonment. Subject to Applicable Law, if the Cable System or any part thereof is abandoned by Franchisee, the City may require the Franchisee to transfer title to the abandoned portions to it at no charge, free and clear of encumbrances, and the same will become the City's property and the City may keep, sell, assign, or transfer all or part of the assets of the Cable System, or otherwise dispose of those assets as it sees fit.

SECTION 10

Franchise Fee

10.1 Amount of Fee. Franchisee shall pay the City a Franchise Fee in an amount equal to five percent (5%) of Gross Revenues derived from the operation of the Cable System to provide Cable Service. If Franchisee uses an accrual accounting system, subscriber payments owed and never recovered shall not be treated as revenue. The Franchise Fee is not a payment in lieu of any tax, fee, or other assessment of general applicability (including any such tax, fee or assessment imposed on both utilities and cable operators or their services), consistent with 47 U.S.C. §542(g)(2). However, to the extent required by law, payments to the Public Service Commission of West Virginia under Chapter 24D of the West Virginia Code for subscribers in the City shall be offset against amounts owed to the City under this section. Franchise fees may be passed through to Subscribers as a line item on Subscriber bills or otherwise as Franchisee chooses, consistent with Federal law.

10.2 Payment of Fee. Payment of the fee due the City shall be made on a quarterly basis, within forty-five (45) days of the close of each calendar quarter. The payment period and the collection of the franchise fees that are to be paid to the City pursuant to the Franchise shall commence sixty (60) days after the Effective Date of the Franchise. The City shall be furnished a statement of said payment, reflecting the Gross Revenues and the applicable charges. To the extent that Franchisee or its Affiliates offer bundles of Cable and non-Cable Service at discounted rates, fees attributable to Cable Service will be based on a pro rata comparison of charges that apply to persons who purchase the Cable Service and non-Cable Service from Franchisee separately; and if that is not

practicable (because some of the bundled services are not offered separately, or are not offered separately as a realistic service offering) payment shall be based on charges that apply to persons who purchase only cable service.

10.3 Accord and Satisfaction. No acceptance of any payment by the City shall be construed as a release or as an accord and satisfaction of any claim the City may have for further or additional sums payable as a Franchise Fee or for the performance of any other obligation of the Franchisee.

10.4 Payment Records. The City may, from time to time, and upon reasonable advance written notice, inspect and audit any and all books and records to determine whether Gross Revenues and Franchise Fees have been accurately computed and paid. In addition to paying all fees owed plus interest, in the event that the City reviews the Franchisee's franchise fee payments, and finds that the Franchisee has underpaid the fee owed for any year in an amount exceeding five percent (5%) of the franchise fees actually paid or Ten Thousand Dollars (\$10,000), whichever is less, Franchisee shall pay the reasonable cost of the City's review.

10.5 Limitation on Recovery. In the event that any Franchise payment or recomputed payment is not made on or before the dates specified herein, Franchisee shall pay an interest charge, computed from such due date, at the annual rate of one percent over the prime interest rate. The period of limitation for recovery of any franchise fee payable hereunder shall be as provided under Applicable Law.

SECTION 11

Records, Reports and Maps

11.1 Reports Required. The Franchisee's schedule of charges, contract or application forms for regular Subscriber service, policy regarding the processing of Subscriber complaints, delinquent Subscriber disconnect and reconnect procedures and any other terms and conditions adopted as the Franchisee's policy in connection with its Subscribers shall be filed with the City upon written request. All changes in the Franchisee's schedule of charges, channel line-up and policies as mentioned herein shall be provided to the City without request. Upon written request by the City, Franchisee shall provide a copy of reports for monitoring the Franchisee's compliance with the terms of this Franchise and Applicable Law.

11.2 Records Required.

The Franchisee shall at all times maintain:

11.2.1. A record of all complaints as required by West Virginia Code §24D-1-19(a) and as such statute may be amended from time to time .

11.2.2. A full and complete set of as-built plans, records and strand maps showing the location of the Cable System. Upon written request by the City, copies of strand maps shall be provided to the City in an electronic format consistent with that used by the City.

11.2.3. The Franchisee shall maintain records sufficient to comply with the requirements of Applicable Law, and to show compliance with all the provisions of this Franchise.

11.3 Inspection of Records. Franchisee agrees that it will collect and make available books and records for inspection and copying by the City in accordance with the terms of this Agreement.

11.4 Time for Production. Books and records shall be produced to the City at City Hall, or such other location as the parties may agree. If Franchisee objects to a request for books and records, it must nonetheless produce the books and records requested, unless the City agrees that they need not be produced, or a court of competent jurisdiction rules otherwise. If documents cannot be copied or moved because (i) they are too voluminous; (ii) of security reasons; or (iii) the requested records contain trade secrets, then the Franchisee may request that City inspection of such records take place at some other location mutually agreed to by the City and the Franchisee, provided that:

11.4.1. The Franchisee must make necessary arrangements for copying documents selected by the City after its review; and

11.4.2 Franchisee must pay all reasonable travel and additional copying expenses incurred by the City (above those that would have been incurred had the documents been produced in the City) in inspecting those documents or having those documents inspected by its designee.

11.4.3 The parties agree that any amounts paid pursuant to this Section 11.4 are not a franchise fee within the meaning of 47 U.S.C. § 542 and fall within one of the exceptions listed in 47 U.S.C. §542(g)(2).

11.5 Uses of System. Without limiting the foregoing, upon request, Franchisee must advise the City of all services it provides via the Cable System (the term "services" for purposes of this section, would include, without limitation, the provision of dark fiber), for entertainment and other purposes, such as data transmission, local area networks, and voice transmission; and to the extent known, the services that are provided by third parties via the Cable System.

11.6 Retention of Records; Relation to Privacy Rights. Franchisee shall take all steps required, if any, to ensure that it is able to provide the City all information which must be provided to the City or that may be requested by the City under Applicable Law or this Franchise, including by providing appropriate Subscriber privacy notices. Nothing in this section shall be read to require a Franchisee to violate 47 U.S.C. § 551 or other Applicable Law governing privacy. Franchisee shall be responsible for redacting

any data that State or Federal law prevents it from providing to the City. Financial records shall be kept for at least five (5) years, other records shall be kept for at least three (3) years except that service call logs may be retained for two (2) years, so long as the information contained therein is reflected in other documents.

11.7 Confidentiality of Certain Information. The City agrees to treat as confidential any books, records or maps that constitute proprietary or confidential information to the extent Franchisee makes the City aware of such confidentiality, and to the extent that the City is permitted to do so by Applicable Law. If the City believes it must release any such confidential books or records in the course of enforcing this Franchise, or for any other reason, it shall advise Franchisee in advance in writing so that Franchisee may take appropriate steps to protect its interests. To the extent permitted by State and federal law, if the Franchisee takes appropriate steps to protect its interests in maintaining such information as confidential, the City agrees that it shall deny access to any of Franchisee's books and records marked confidential, as set forth above, to any Person.

SECTION 12

Community Programming

12.1 Preservation of Existing Benefits. Franchisee shall continue to provide and maintain all existing equipment, facilities and other support for PEG use that it was providing prior to and upon the effective date of this Franchise, until and unless the City notifies Franchisee that such support is no longer necessary.

12.2 Provision of Channel Capacity for PEG Use.

12.2.1 Franchisee shall provide up to three channels for PEG use upon request. The City is deemed to have requested any PEG channel currently being provided in the City. PEG capacity used for video programming may not be used to transmit "commercial matter" as that term is defined and interpreted under Section 73.670, Note 1, of the FCC rules, 47 C.F.R. §73.670. PEG Channel capacity may not be leased to third parties for delivery of commercial matter, or for delivery of video programming that a Subscriber is charged a separate fee to receive (over and above the fee that Franchisee charges for the service tier with which the signal is provided); but nothing in this sentence prevents the levy of a fee by the City to defray costs that the City may incur in connection with the PEG channels, subject to Applicable Law. By way of example and not limitation, the parties do not intend to limit sponsorship announcements

comparable to those that might be carried on a noncommercial broadcast station, or to prevent Schools from charging course fees, and then delivering the course via the PEG Channels; or to prevent solicitations of financial support for the provision of PEG Channels by the entities responsible for managing those channels.

- 12.2.2 At any time after Franchisee begins offering commercial services on-demand the City may request the company to investigate whether capacity could be made available for PEG use on demand. If it is financially and technically feasible to do so, Franchisee will make on-demand capacity available. In determining whether it is financially and technically feasible for provide capacity on-demand, and in determining what is a reasonable amount of capacity, the parties will examine the provision of PEG capacity on-demand in other communities.

12.3 Timing for Provision of Channels. With respect to the channel capacity required by Section 12.2.

- 12.3.1 Franchisee shall continue to provide channels it is providing as of the effective date of this agreement.

- 12.3.2 In other cases, within one hundred eighty (180) days of receipt of a written request by the Franchising Authority, the Franchisee shall provide the Franchising Authority with the additional PEG Channels. Franchisee shall have the right to petition the Franchising Authority to recapture any unused portion of the channels. In deciding whether to grant such a petition, the Franchising Authority shall consider the comments and views of the Franchisee and all other interested persons or entities. Upon thirty (30) days written request and demonstration that the channel time recaptured by the Franchisee may be utilized by the Franchising Authority, the Franchisee shall make the channel time available.

- 12.4 **Management of Channels.** The City may manage the PEG channels in whole or in part, or designate entities to manage the PEG channels in whole or in part. The City may establish rules for use of PEG capacity, or delegate that authority to an entity responsible for managing a channel.

12.5 Availability of channels.

- 12.5.1 PEG channel capacity, other than the on-demand channel provided under Section 12.2.2 must be viewable by any Subscriber without the need for

obtaining any equipment other than the equipment required for the other services to which the Subscriber subscribes; and shall be provided as part of Basic Service tier, or if there is no basic service tier, as part of the service provided to any Subscriber.

12.5.2 On-demand PEG capacity must be available to any subscriber who receives a digital service from Franchisee without additional charge.

12.5.3 To the extent technically feasible, PEG programming choices shall be displayed on menus in a manner equivalent to the manner commercial programming choices are displayed. It is the responsibility of the entity managing a PEG channel to timely provide information that it wishes to have displayed on the menu.

12.5.4 PEG channel capacity required to be carried on the Basic Service tier shall be provided in analog format until such time as Franchisee digitizes all other channels on the basic service tier other than menu channels. PEG links and channels must be designed so that there is no noticeable deterioration in signal quality or programming as received from the PEG programmer. Once Franchisee digitizes all other signals on the Basic Service tier, it shall provide all PEG channels in a digital format, including cablecasting in high definition format any PEG programming provided in high definition format. Channels used should be of a quality equivalent to other channels that were carried on the Basic Service tier.

12.6 Franchisee's System Responsibilities

12.6.1 Franchisee shall be responsible for: providing and maintaining links ("PEG links") to and from designated locations for purposes of: transporting PEG signals to locations responsible for playback or editing of PEG programming; transporting signals from those locations to Franchisee's headend/control facilities; converting the PEG signals as necessary; and placing the PEG signals, as appropriate, on proper channels, all without any noticeable PEG signal deterioration. Each location must be capable of monitoring signals Franchisee delivers to Subscribers.

12.6.2 The City has designated the following six locations for PEG links:

Capital High School
Cultural Center at State Capitol
Clay Center
City Hall
Charleston Civic Center

Kanawha County Public Library (new location)

12.6.3 Franchisee shall be responsible for the cost of providing the links upon request, however the City shall be responsible for the incremental cost of such link if it is more than one mile from Franchisee's fiber. The City may designate additional locations for PEG links, as long as it agrees to pay the incremental cost of extending the cable system to provide the link.

12.6.4 The links shall be configured as needed to allow any of the designated locations to function as a playback facility for one or more PEG channels, as the City may direct. If Franchisee makes changes to its System that necessitate modifications to PEG facilities and equipment, including but not limited to the links, Franchisee shall provide any additional facilities or equipment necessary to implement such modifications within 30 days of the date that the System changes are made, so that PEG facilities and equipment may be used and operated as intended.

12.6.5 Franchisee shall not be responsible for the quality of the PEG signal it receives.

12.6.6 Franchisee must provide the links upon request within one hundred twenty (120) days.

12.7 Capital Support for PEG.

12.7.1 Franchisee shall provide an amount of \$25,000.00 to the City upon request, for the City's institutional network capital costs. In addition, the Franchisee shall agree to provide capacity for the City's institutional network at the lesser of a) a discount of ten (10) percent of the Franchisee's commercial cost of construction, or b) at the incremental cost of construction if the construction is undertaken at the time the Franchisee is installing conduit for its own purposes. Both parties agree that the funds provided and costs incurred herein are in the nature of capital support funds, shall not be deducted from the franchise fee, and shall not be passed through to subscribers.

12.7.2 In addition to satisfying its other obligations herein, upon one hundred eighty (180) days advance written request, Franchisee shall provide funding, which may be used only for capital costs associated with the channel capacity designated for PEG use and with the facilities and equipment for the use of such channel capacity in an amount up to twenty five (25) cents per Subscriber per month. PEG use includes institutional network capital costs.

12.7.3 Prior to requesting Franchisee to provide the capital support for PEG channels, the City must conduct a public hearing to review the need for the support, and how the support will be used. Franchisee shall be provided an opportunity to present information as to the effect of the request upon Subscribers, and to introduce any surveys or other pertinent information regarding fees.

12.7.3 If Franchisee enters into a contract with an entity responsible for managing a PEG channel for operational support of PEG, the City may relieve Franchisee of all or part of its capital funding obligations under this Section.

12.7.4 Both parties agree that other than as provided in section 12.7.1 of this Agreement, capital support funds shall not be deducted from the franchise fee but may be passed through to all Basic Subscribers in the City as a separate line item on Subscriber billing statements.

12.8 Channel Location.

12.8.1 Franchisee agrees to use reasonable efforts to locate PEG channels so that they are grouped with the majority of channels a Subscriber receives as part of the lowest level of service offered on the System.

12.8.2 Franchisee shall not change the channel position for any PEG channel without the City's consent unless the change is required by federal law. The City will grant consent unless it determines that the change would adversely affect the PEG channel. A change in the channel position requires at least sixty (60) days notice.

12.8.3 Franchisee shall pay reasonable expenses associated with a change in the PEG channel positions, up to \$3000 per change, including the provision of up to two (2) 15-second slots per day, on the channel previously occupied by a PEG channel, mixed over morning, afternoon, evening and late night time slots, for thirty (30) days after a change in channel positions, subject to limitations contained in the contract between the Franchisee and the programmer that occupies the slot formerly occupied by the PEG channel.

12.9 Free Service to Certain Locations.

12.9.1 Franchisee shall, without charge, provide the following to each School, municipal and county government building within the City upon request or automatically to any site to which it has a drop as of the date of this Agreement: (i) at least one activated drop and outlet (with signal levels to the ground block comparable to the signal levels provided to multiple

dwelling units); (ii) *Basic Service* (iii) all PEG channels; and (iv) all terminal equipment necessary to receive the services described in this subsection. If Franchisee materially reduces the number of channels on basic, or the number of educational and news channels on basic, below the number offered on October 2, 2006, upon request Franchisee shall provide packages of programming reasonably comparable to what was provided before the material change. C-SPAN is considered an educational service for purposes of this subsection. There will be no charge for the drop at any location where the location to be served is already connected to the cable system or where the location is 300 feet or less from the public right of way. Where a location is more than 300 feet from the public right of way, the location must agree to pay the actual, additional labor and materials cost of providing the drop beyond the first 300 feet.

12.9.2 Each location may itself extend service from the drop to additional outlets. Franchisee shall not be responsible for signal leakage or the signal quality at any additional outlet or inside wiring that was not installed by Franchisee. Consistent with federal rules, Franchisee may terminate service to a location where there is a leakage problem until the leakage is repaired. Franchisee shall not be obligated to repair inside wiring or additional outlets not installed by Franchisee. If a location extends service to multiple drops, the location shall pay for any additional line amplifiers required to deliver the service.

12.9.3 For non profit colleges and universities, Franchisee will provide no more than one drop and free outlet of Cable Service. Such drops will not be provided and may not be extended to: (a) residential dwelling units; (b) areas in stadiums, auditoriums, or dining halls used by members of the general public. The same rules that apply to locations for drop cost under 12.9.1 apply to drops to colleges and universities under this section.

12.10 No Charge for Use. Except as otherwise provided herein, the facilities, equipment and channel capacity provided for PEG Use shall be available at no charge from Franchisee to users, to the City or to any Designated Access Entity.

12.11 Costs Caused by Franchisee. If Franchisee makes changes to its Cable System that necessitate modifications to PEG facilities and equipment (including but not limited to the upstream paths), Franchisee shall at the same time provide any additional facilities or equipment necessary to implement such modifications so that PEG facilities and equipment may be used and operated as intended in this Agreement. By way of example, and not limitation, should the Franchisee cease delivery of all signals in an analog format to Subscribers, it shall provide the

facilities and equipment necessary so that PEG signals can be delivered in a digital format.

12.12 Support Not A Franchise Fee. The parties agree that any cost to the Franchisee associated with providing any support for PEG use required under this Franchise, shall not constitute a Franchise fee, within the meaning of 47 U.S.C. § 542 and shall be deemed to fall within one or more of the exceptions listed in 47 U.S.C. § 542(g)(2).

12.13 Costs Not Franchise Fees. Any cost to the Franchisee associated with providing any support for PEG Use required under this Franchise (including the provision of the I-NET and support therefor) and payments made outside this Franchise, if any, are not a Franchise Fee within the meaning of 47 U.S.C. § 542, and fall within one or more of the exceptions listed in 47 U.S.C. § 542(g)(2).

12.14 Limitations on Use. The Cable Service provided pursuant to this Section shall not be used for commercial purposes

SECTION 13

Performance Guarantees and Remedies

13.1 Bond or Letter of Credit.

13.1.1. At the discretion of the Franchisee, Franchisee shall file with the City and at all times thereafter maintain in full force and effect during the continuance of this franchise, at the Franchisee's sole expense, a corporate surety bond or letter of credit in a form acceptable to and approved by the City in the amount of \$100,000.

13.1.2. The bond or letter of credit shall:

13.1.2.1. Secure the faithful performance of all work required by the Franchise, including, but not limited to, completion of the I-NET;

13.1.2.2. Be sufficient to provide for restoration of the Public Rights-of-Way and other property that may be affected by the construction, given the scope and nature of the work proposed.

13.1.3. The bond or letter of credit shall provide that, in the event Franchisee fails to comply with its obligations under the Franchise or Applicable Law, there shall be recoverable, jointly and severally from the principal and surety of the bond, any damages or loss suffered by the City as a result, including the full amount of any compensation, indemnification, or cost of removal or abandonment of any property of the Franchisee, or the cost of completing or repairing the Cable System construction,

upgrade, or other work in the Public Rights-of-Way, plus a reasonable allowance for attorneys' fees, up to the full amount of the bond or letter of credit.

- 13.1.4. The performance bond or letter of credit shall provide that it shall be forfeited to the City under following conditions:

13.1.4.1. the Franchisee abandons the Cable System; or

13.1.4.2. the Franchise is revoked for cause.

- 13.1.5. The performance bond shall be issued by a surety licensed to do business in West Virginia and shall contain the following endorsement: "This bond may not be canceled, or allowed to lapse, until sixty (60) days after receipt by the City, by certified mail, return receipt requested, of a written notice from the issuer of the bond of intent to cancel or not to renew."

13.2 Material Term. The required bond or letter of credit is a material term of this Franchise.

13.3 Revocation or Termination of Franchise. In addition to all other rights of the City under this Franchise, the City shall have the right to revoke or shorten the term of the Franchise for material violation of the terms of this Franchise and for any of the other reasons specified in West Virginia Code §24D-1-10.

- 13.3.1. **Notice of Violation.** If the City believes that the Franchisee has not complied with the terms of the Franchise, the City shall first informally discuss the matter with Franchisee. If these discussions do not lead to resolution of the problem, the City shall notify the Franchisee in writing of the exact nature of the alleged noncompliance (the "Violation Notice").

- 13.3.2. **Franchisee's Right to Cure or Respond.** The Franchisee shall have thirty (30) days from receipt of the Violation Notice to (i) respond to the City, contesting the assertion of noncompliance, or (ii) to cure such default, or (iii) if, by the nature of default, such default cannot be cured within the thirty (30) day period, initiate reasonable steps to remedy such default and notify the City of the steps being taken and the projected date that they will be completed.

- 13.3.3. **Public Hearing.** If the Franchisee fails to respond to the Violation Notice received from the City, or if the default is not remedied within the cure period set forth above, the City shall schedule a public hearing if it intends to pursue action to seek correction of the violation or to take further action; including possible revocation. The City shall provide the Franchisee at least thirty (30) days prior written notice of such hearing specifying the time and place of such hearing. The

Franchisee and other interested parties shall have an opportunity to submit data, views or argument orally or in writing for the record of the hearing. The public hearing shall be on the record and a written transcript shall be made available to the Franchisee within ten (10) business days. The City shall determine if the Franchisee has committed a violation and shall enter a written decision. Nothing in this Franchise prevents Franchisee from seeking review of the City's decision in a court of competent jurisdiction.

- 13.3.4 **Enforcement.** Subject to Applicable Law, in the event the City, after the hearing set forth in subsection 13.3.3 above, determines that the Franchisee has materially violated any provision of the Franchise, the City may, in addition to the remedies set forth in Chapter Twenty-Four D of the West Virginia Code:

13.3.4.1. Revoke the franchise; or

13.3.4.2. Seek appropriate relief from a court or agency of competent jurisdiction under this franchise or Applicable Law.

- 13.3.5 Upon revocation of the Franchise, Franchisee shall have the rights provided under Section 9.4.4.

13.4 Remedies Cumulative. All remedies under the West Virginia Cable Television Law and this Franchise are cumulative unless otherwise expressly stated. The exercise of one remedy shall not foreclose use of another, nor shall the exercise of a remedy or the payment of penalties relieve the Franchisee of its obligations to comply with its Franchise. Remedies may be used singly or in combination; in addition, the City may exercise any rights it has at law or equity. Except that, the City is not entitled to recover damages for the same injury under two separate sections where doing so would result in a double recovery.

13.5 Relation to Insurance and Indemnity Requirements. Recovery by the City of any amounts under insurance, the bond, the letter of credit, or otherwise does not limit the Franchisee's duty to indemnify the City in any way; nor shall such recovery relieve the Franchisee of its obligations under the Franchise, limit the amounts owed to the City, or in any respect prevent the City from exercising any other right or remedy it may have.

SECTION 14

Miscellaneous Provisions

14.1. Force Majeure. The Franchisee shall not be deemed in default with provisions of its Franchise where performance was rendered impossible by war or riots, civil disturbances, floods or other natural catastrophes beyond the Franchisee's control or the unforeseeable unavailability of labor or materials. The acts or omissions of Affiliates are not beyond the Franchisee's control, and the knowledge of Affiliates shall be imputed to

Franchisee. The Franchise shall not be revoked or the Franchisee penalized for such noncompliance, provided that the Franchisee takes immediate and diligent steps to bring itself back into compliance and to comply as soon as possible under the circumstances with its Franchise without unduly endangering the health, safety and integrity of the Franchisee's employees or property, or the health, safety and integrity of the public, Public Rights-of-Way, public property, or private property.

14.2 Equal Protection.

- 14.2.1 Should the City issue a Title VI cable franchise to a cable operator (the "New Entrant") that permits that New Entrant to provide service on terms and conditions that are materially more favorable, or materially less burdensome than those imposed on Franchisee, such that Franchisee is unreasonably disadvantaged in competing with the New Entrant, Franchisee may notify the City that it wishes to obtain relief from its obligations under this Franchise, which notice must be given within 30 days of the issuance of the Franchise to which Franchisee objects. The notice must identify (a) the reasons why Franchisee believes the Franchise is materially more favorable or materially less burdensome; and (b) identify the sections of the Franchise that must be altered, and the alterations required.
- 14.2.2 If the City has the legal authority to impose equivalent obligations on the New Entrant, it shall grant appropriate relief to Franchisee. As a condition of the relief, City may require Franchisee to satisfy any obligation or legal requirement imposed upon the New Entrant under applicable law or under the New Entrant's franchise. Franchisee must comply with its franchise until and unless relief is granted by the City, or by a court of competent jurisdiction.
- 14.2.3 If, after the effective date of this Franchise, an entity constructs facilities in the rights of way in the City that it uses to deliver multi-channel video programming equivalent to cable service directly to subscribers, and such entity is not subject to requirements under Applicable Law or an authorization issued by the City, Franchisee shall be relieved of its build out obligations under Section 6 of this Agreement. This section may not be read to apply where the service is provided via an open video system or by a system that offers video carriage on a common carrier basis. This section does not apply to wireless or broadcast systems.
- 14.2.4 This section does not permit Franchisee to recover any money, facilities or equipment from the City, or permit Franchisee to refuse to provide facilities or equipment for which the City pay in whole or in part under this agreement.

- 14.2.5 This section does not apply to entities covered by sections 14.2.1 or 14.2.3 above: (a) in areas annexed after the effective date of this franchise; (b) to the extent that they serve any campus or educational institution; or (c) in any location not served by Franchisee at the time construction of the system commences.
- 14.2.6 If federal or state law permits an existing Franchisee to opt out of its Franchise, nothing in this section shall be read to prevent the Franchisee from exercising its rights under federal or state law.

14.2 Action of Parties. In any action by the City or the Franchisee that is mandated or permitted under the terms hereof, such party shall act in a reasonable, expeditious and timely manner. Furthermore, in any instance where approval or consent is required under the terms hereof, such approval or consent shall not be unreasonably withheld.

14.3 Notices. All notices, reports or demands required to be given under this Franchise shall be in writing and shall be deemed to be given upon delivery if delivered personally to the person designated below, or on the fifth day following mailing if sent in accordance with the notice requirement of this Section and deposited in the United States mail in a sealed envelope, with registered or certified mail postage prepaid thereon, or on the next business day if sent by express mail or overnight air courier addressed to the party to which notice is being given, as follows:

If to the City:

City of Charleston
Post Office Box 2749
Charleston, WV 25330
Attn: Mayor

If to the Franchisee Suddenlink Communications:

By Mail to

P. O. Box 1220
4038 Teays Valley Road
Scott Depot, WV 25560
Attn: Vice President of Operations, or

By Hand Delivery to:

Vice President of Operations
4038 Teays Valley Road
Scott Depot, WV 25560

And a courtesy copy to:
Suddenlink Communications
12444 Powerscourt Drive, Suite 140
St. Louis, MO 63131
Attn: Director of Government Relations

14.4 Effective Date. The Franchise granted herein will take effect and be in full force from such date of acceptance by Franchisee recorded on the signature page of this Agreement. This Franchise shall expire on October 3, 2011, unless extended in accordance with the provisions of this Agreement or by the mutual agreement of the parties.

Considered and approved this 3rd day of October, 2006.

**CITY OF CHARLESTON,
WEST VIRGINIA**

Signature: _____

Name/Title: Mayor

Accepted this 24 day of October, 2006, subject to applicable federal, State and local law.

**CEBRIDGE ACQUISITION, LLC,
DOING BUSINESS AS SUDDENLINK
COMMUNICATIONS**

Signature: _____

Name/Title: Dale Bennett, Sr. Vice President

Date: 10/24/06